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I N T H R E E V O L U M E S.

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V O L. III.

Containing The IXth Division of Essay II.
with Essays III. IV. and V.

L O N D O N:

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MDCCLXXXIX.



E S S A Y II.

Continued.

IX. Of other Matters respecting new Trials, &c.

(1.) Of Mis-trial.

ACTION of *debt*, brought upon the statute of *Ed. VI.* for *tithes*, and the plaintiff declared that one was seised of the rectory of *Elvely, alias Kirkley*, in *Kingston* upon *Hull*, in his demesne as of fee; and being so seised, on such a day, at *Elvely, alias Kirkley*, did demise to the plaintiff the said rectory, with the appurtenances, to have and to hold, &c. for years, and that by virtue thereof he had been and was thereof possessed, and that the defendant such a day, and before, and always afterwards, hitherto held and occupied thirty acres of land in *Swandland*, in *Kingston*, in a place called *T.* and that the tithes did belong to him. The defendant pleads, *Nil debet per patriam*; and after verdict it was alledged, in arrest of judgment, that the issue was mis-tried, because the *Venire facias* was of *Elvely alias Kirkley*, and it should have been of *Swandland*, where the tithes grew.

Cooper v.
Bacon,
1 Brownl. 75.
The *Venire
facias* mis-
awarded.

I cannot find this case in any other author : from the marginal note, I conceive the Court adjudged the *Venire facias* misawarded.

Smith and Hancock, and others, M. 24. Car. Banc. Reg. Styles, 137.

For a new trial, because of a mis-trial, the cause being tried before persons interested.

Smith brought an action of trespass against *Hancock*, and others, for taking away divers parcels of ribbon from him. The defendants pleaded, by way of justification, the custom of *London* against hawkers ; *videlicet*, to take away wares from any that sold them up and down the streets.

The plaintiff replied, that there was no such custom, and issue was taken upon it, and thereupon the custom was certified by the mouth of the Recorder, and a trial upon it in *London*, and a verdict for the defendants. The plaintiff moved in arrest of judgment, that it was a mis-trial, because it was before those who were interested in the cause, and therefore desired there might be another trial. *Roll* Justice said, it is against natural equity, for one to be judge in his own cause, although the other party admit it to be so, and therefore it is a mis-trial, though it were at the request of the plaintiff, because it is against natural reason. 8 *E. III. f. 69.* 5 *Ed. III. 8.* 9 *H. VII. f. 21.* *Hil. 38 Eliz.* in the Exchequer. The prayer of the plaintiff cannot help the trial, for the consent of both parties cannot change the law, much less the prayer of one of the parties. *Hales*, of counsel with the defendants, argued, that it was not a mis-trial, and said this concerns them in point of privilege of the city, and not merely in point of interest, before whom the judgment was given. 2dly. The consent of the party hath barred him of the advantage which otherwise

he

Trial.

he might have had. But *Roll* Justice answered, here is point of interest as well as point of privilege, for part of the goods taken come to the benefit of the city, and therefore they ought not to be their own judges, for this is against natural reason, and so it is a mis-trial. But it doth not appear here, whether the Mayor and Aldermen be another corporation or not, and distinct from the corporation alleged, which certified this custom by the mouth of the *Recorder*, and this is the sole doubt in the case. *The Court ordered that there should be a new trial, except cause shewn to the contrary. Q. Whether there shall be a repleader, or a new Venire?*

This was *replevin*: Lord Mountague was seised of the *Honour of Gloucester*, extending into *divers counties*, and consisting solely of services without demesnes; within which honour there is a custom that each tenant dying seised of an inheritance, shall pay for each messuage and cottage 5s. and for each acre of pasture and for each acre of meadow &c. for which sums the bailiff of the lord or his deputies may distrain. *Sir Tho. Reed*, a tenant of the said honour, died seised of an estate in fee-simple or tail, after whose decease the bailiff distrained in an acre of which *Sir Tho.* died seised in *Denford*, in the county of *Northampton*, which acre is within the honour of *Gloucester* aforesaid; and note, that the custom aforesaid was for distraining any beasts upon the land within the honour. And upon *replevin* brought, issue was taken upon the custom, and *Venire facias* from *Den-*

Hill v. Bunning,
H. 12 Car. II.
C. B. Entr. T.
1659. Ro. 402.
1 Sid. 17.
Vid. Br. Avow-
ry, 46. 14.
H. IV. 2.
Replevin. Custom for having so much upon dying seised, &c. and for distraining all beasts.
Question from whence the *Venire facias* ought to have issued.

ford. And the custom being found, it was moved in arrest of judgment,

1. For the unreasonableness of the custom.
2. For the mis-trial.

With respect to the first point, a variety of arguments were used, *pro et con*; but as the Court did not give judgment upon that point, they are here omitted.

As to the second point, If this was a mis-trial? it was argued by *Maynard* and *Barnard* for the defendant, that this is not a mis-trial, but that the *Venire facias* from *Denford* is good enough, for it ought to be from the county of N. or from the county of *Gloucester*, or from the vill. of D. 1. It cannot be from the body of the county of N. inasmuch as it does not appear that the honour is in this county only; for it doth not appear that the honour is extended out of D. yet in truth the honour is extended into several counties. 2. It cannot be from the honour of *Gloucester*, for an honour is only an accumulation of services; and although an honour may consist of demesnes and services, yet this honour hath only services, and it cannot be shewn that a *Venire facias* was ever yet from an honour, because that *Littleton's* argument may be used; *videlicet*, if such thing could have been done, it would have been seen before this time, therefore they concluded that the venue could not be from an honour, any more than from a forest, 1 Rep. 127. 3. Therefore if it cannot be from the two places before-mentioned, of necessity it ought to be from the vill. of *Denford*, where the capture is supposed. And to prove this, they relied upon a case between *Row et Litchford*, 16 Jac. in B. R. where upon

² Leon. 36.

Pl. 47.

Hob. 266.

² Rob. Ab. 617

Pl. 2. Sid. 88.

Pl. 4. Et. 326.

Pl. 5. 3 Cro. 200.

upon issue joined upon a custom of the *Stanaries*, a *Venire facias* was from the vill. where, &c. and not from the *Stanaries*, nor from the county. *Vide* 22 H. VI. 35. Where a *Venire facias* shall be from the vill. and not from the county. *Et vid. Cro.* 2. 8.

But, admitting that it was not a good trial by the common law, yet they said, that this being after verdict is aided by the stat. 21 *Jac.* cap. 13; for, by this statute, if a *Venire facias* be from one place, where it should be from two, if it be after verdict, it is aided, *Cro.* 1. 480. and *vide* a case upon this point T. 1649, in B. R. *Simpson and Golden, Entr.* 22. *1 Cro.* 162, 170.
Car. 1. *Ro.* 107. *2 Ro.* 617, 618.

But to this it was answered by the plaintiff's counsel, and so agreed *per Cur'*, that this is a mis-trial, and that not only by the common law, but also since the statute. *For plaintiff Cur'.*

1. By the common law: if land held of a manor be in another vill. the *venue* shall be from both; for if the issue is to be tried of a greater extent than the *venue*, as if the *venue* be of *King-Street*, where the issue is of *St. Margaret*, this is a mis-trial, for the *venue* ought to be as large as the thing to be tried. *Hob.* 76. And *Simonds et Burlowe's* case, *Cro.* 2. *Arundell's* case, *Co.* 6. And also on the other part it seems that the *venue* ought not to be larger than the issue, for if the *venue* be of a manor and vill, where it should be of the manor only, this is not good, as was held T. 12 *Jac.* in B. R. *Ro.* 1979. *2 Cro.* 405.

And it is not necessary for us to enquire if the *venue* here ought to be of the body of the county, or of the honour; (but it seemed to the Chief Justice that it could not

1 Inst. 81. b.
Sid. 23.
Dy. 376, 11, 23.

be of the honour, and he used the argument of *Littleton si parentes conquerantur*, &c. before, and of *Ld. Dyer*, 376. *Co. L.* 81. (*Sid.* 114.) that error does not lie upon a judgment in the *Cinque Ports*, because no such writ hath ever yet been brought) for it is sufficient to prove, that it ought not to be from *Denford*, and from D. it may not be; for how can the *visne* of D. try a custom of the honour of *Gloucester*, where it does not appear by all the pleadings that D. is within the said honour? therefore, for the same reason that it might be from D. it might be from any other vill, in the county of *Northampton*.

Vid. 16, 17.
Car. II. cap. 8.

2. This is not aided by the statute, for the statute which aids this mis-trial, if any would, is the statute 21 *Jac. c.* 13. And this statute, as the Chief Justice said, only aids mis-trial in two cases.

1. This statute only aids where the *venue* ought to be from several places.

2. This statute only aids where one of the places is truly named; but in our case it is not so, for the statute does not extend to it.

Judgment.

And so *per totam Cur'*, after several arguments at the bar, the judgment was arrested, and a *Venire facias de novo* awarded, if the plaintiff chose to take it; but they agreed that he might be nonsuited if he would.

Hob. 16.
Sid. 9, 13, 15.

Nota, That the Court did not give their opinion as to the custom, nor as to the place from whence the *Venire facias* should issue.

The Chief Justice observed, that there was not any known place mentioned in the avowry as there ought to have been; but inasmuch

as

as it was after verdict, it was good enough, otherwise if there had been a demurrer before verdict, for the want of it upon such demurrer would have made the avowry bad, and so he said the books are reconciled.

Sid. fo. 10.

By 4 Ann, c. 16. § 6. writs of *Venire* are to be *de corpore comitatus*.

Action of covenant was brought in *Hampshire*, and breach assigned for not repairing a house in *Berkshire*, and the issue joined was *non infregit conventionem*, and verdict in *Hampshire* for plaintiff.

Gilbert v. Martin, M.
15 Car. II. B. R.
1 Sid. 157.
Covenant in H. and breach assigned in another county, and trial in H. this is a mis-trial.
1 Lev. 114.
7 Co. 2, 3.
Ray. 85.
1 Keb. 575.

And it was moved, in arrest of judgment, that this was a mis-trial; and of this opinion was the Court upon consideration (except *Windham*) for they said, that this was a special issue, upon which nothing could be given in evidence but the not repairing of the house, which is in *Berkshire*; and although the privity remains, this action being proper, between those who are parties to the deed and not assignees, &c. yet not any election could be given to the plaintiff in this case, for which reason it seemed to them that it was a mis-trial.

1 Cro. 101,
132, 142.
2 Cro. 446.

Action upon the case for an escape, upon *mesne* process, was brought in *Exeter* against the Sheriff of the county of *Devon*, and the declaration was of a taking at *Topsham*, which is in *Devonshire*, and that the defendant suffered him to escape at *Exeter*. And after verdict for the plaintiff it was moved, in arrest of judgment, because the plaintiff had declared against the Sheriff of *Devonshire* for an escape at *Exeter*, which is a city and county

Hopping v. Holmy, E. 20.
Car. II. B. R.
1 Sid. 364.
Escape supposed in another county, yet good after verdict, and it shall be intended that he was there by Habeas Corpus, &c.
2 Keb. 350.

of itself, and not part of the county of *Devon*, and for this it was at first stayed.

7 Co. 2. 2.
2 Brownl.
165, 166.
2 And. 35.
Pl. 22.

But, at another day, judgment was given for the plaintiff, by all but *Twisden* Justice; for being after verdict, it shall be intended that the defendant had the custody of his prisoner in *Exeter*, either upon *Habeas Corpus*, or upon fresh pursuit. But per *Twisden* this is too foreign an intendment.

1 And. 291.
2 And. 35.
The judge
sat in one coun-
ty, and the jury
were in ano-
ther, upon the
trial of this
cause.

Nota, In this case it was said, that in *Nottingham*, which is a city and county, the judge sits in the city, and tries the causes of the county at large.

The jury were, and gave their verdict, in the county at large, but the clerk took and recorded their verdict in the city.

And judgment was given for the plaintiff, *Nisi, &c.*

Lander and
Elliot. H. 3 & 4
Jac. II. in B. R.
Comb. 75.
Declaration
in Middlesex,
plea in Hert-
ford.

Debt for rent brought in *Middlesex*. The defendant pleaded an entry before the rent became due, and that he was held out, &c. at such a place in *Hertfordshire*, where the land lay; and issue was taken thereon, and tried in *Middlesex*.

Mis-trial.

Pemberton moved, in arrest of judgment, that this was a mis-trial.

Tremain contra. It is aided by the statute of *Jeofailes*, *Croft*, and *Waters's* case, in *Saunders*, adjudged (I believe he meant *Craft* and *Boit*. 1 *Saund.* 247) *Wise* and *Adderly's* case in *C. B.* in *Saunders*.

Locality.

Pemberton. A local justification will alter the case, and the locality was necessary in our case; otherwise in the case in *Saunders*, (which was agreed by the Court) the later judgments are contrary to *Wise* and *Adderly's* case; so per *Pollexfen* in *Jennings* and *Hankey's* case.

Curia.

Curia. This is a mis-trial, and a *Venire facias de novo* was awarded.

The plaintiff declares, that he was the first inventor of the horizontal mill, for which he had letters patent for fourteen years, and that notwithstanding which, the defendant made another mill, like, &c. and damages, &c. Verdict *pro quer'*.

Edgborough v. Stephenfon.
P. 4 Jac. II.
B. R. Comb. 34.
Fact in Staffordshire, tried in Middlesex, no mis-trial.

Holt moved, in arrest of judgment, that it was a mis-trial in *Middlesex*, the mill being made in *Staffordshire*, where only the cause of action ariseth.

Obj. Bulwer's case. *Answ.* In that case there are two tortious acts there; *secus* in our case.

Here the letters patent are only an inducement to the action. 1 *Cro.* 143, 183.

He is the offender who useth the art, and not he that makes the mill, which the Court denied.

Pollexfen pro judicio.

The cause of action ariseth in both counties. *Vide 7 Co. Bulwer's case*; but admitted, that before *Bulwer's case*, the opinion was, that the action should be brought where the original fact was done.

Obj. That it is not averred, that no other used this art before the plaintiff, at the time of granting the patent.

Answ. It appears by the record *quod primus invenisset, &c.*

Obj. Notwithstanding that, it might be used beyond sea.

Answ. Admitting that, yet it shall be good, and within the statute, for that speaks only of new manufactures within this realm, which *Holloway* agreed.

The Court over-ruled the exceptions, and gave judgment *pro quer'*.

Debt

Smith v. Sephton. In B. R. Comb. 115.
Bond at Chester tried here.

Debt on bond made at *Chester*, on *plene administravit* pleaded, it was tried here by *mittimus* to *Chester*, and a verdict for the plaintiff: it was now moved in arrest of judgment, that the bond being made at *Chester*, ought to be tried there; but it was adjudged, because it was not pleaded, that the party dwelt there, or had whereby to be attached there, that there would be a failure of justice, if it could not be tried here; and *Minshew* and *Ireton* (*per Dolben*) was adjudged accordingly.

Comb. 30, 48.

Judgment for the plaintiff. Vide *Fitz Jurisdiction*, 29, 57.; and *Jennings* and *Hankey's* case. Vide *post*, IX. (2.)

Heath v. Walker, in Middlesex, T. 12 Geo. II. B. R. 2 Stra. 1117.
If it appears no issue is joined, the jury must be dismissed.

Upon looking into the record there was no issue joined, for it was *et praed'* the defendant, instead of the plaintiff, *similiter*: it was therefore objected, that the Chief Justice had no commission to try any issue. And the doubt was, what to do, for the Jury had been sworn. And upon advising with the Bar, the Chief Justice dismissed the Jury, for he could not call the plaintiff, or suffer the defendant to take a verdict.

V. 1 Stra. 267.

IX. Of other Matters respecting new Trials, &c.

(2.) Of Locality of Trial.

Vide ante IX. (1.) *Lander v. Elliot.*

COVENANT laid at *Tarvin*, in the county of *Chester*, upon a demise of an house situate at *Chester*: and several breaches were assigned; *videlicet*, for non-payment of rent, and for not keeping the house in repair. The defendant pleaded *riens arrear*; and that he had kept the house in good repair, &c. whereupon several issues were joined, and the cause was tried by *mittimus* before the Chief Justice of *Chester* at the last Assizes, where the plaintiff obtained a verdict, and several damages upon the several issues: And now it was moved by Sir *Barth. Shower*, that this was a *mis-trial* as to the *repairs*, for it appears the house is situate in the city of *Chester*, which is a distinct county, and the issue being local, could not be tried by a jury *de vicineto de Tarvin in com. Cestr'*, and to that opinion the Chief Justice at first inclined; but afterwards, the whole Court held, that it was aided after verdict by the *stat. 16 and 17 Car. II.* being tried by a jury of the county where the action was laid.

Lady Calverley v. Sir Richard Leving, P. 10. W. III. B. R. Comb. 472. Covenant, and several breaches assigned; one being local, tried out of the county, yet aided after verdict.

Leeds v. Power.
H. 7. Geo. B. R.
1 Stra. 417.

How to com-
pel an assign-
ment of errors
on writs from
Ireland.

Per Strange:
Hill. 8 Geo.
Huxley v. Bur-
ton. In an Irish
writ of error I
had the same
rule.

Hill. 11 Geo.
Waters v. Bal-
lantine, I had
the same rules
on my motion.

Error *tam in redditione judicii* in an eject-
ment in C. B. in Ireland, *quam in affirmatione*
ejusdem in B. R. there.

The beginning of the term I moved for
the common rule, that the plaintiff should
assign his errors, it not being usual to take
out a *scire facias*, as we do on writs of er-
ror from C. B. When that rule was out, I
moved again, upon an affidavit, that we could
find nobody concerned for the plaintiff in
error, and had fixed it up in the office; that
therefore we might be at liberty to sign a
non pros, else if we should be put to send the
rule over to Ireland to be served, the delay
would be as great as in the case of a *scire*
facias, and it being a writ of the plaintiff's
own suing out, he must be apprised when
was the due time to come in and prosecute it.
Whereupon the Court made a new rule, that
unless errors were assigned within four days
after fixing a new note up in the office, the
defendant in error should be at liberty to sign
a *non pros*.

Within the time errors were assigned; and
on the arguing, Reeve objected, that it is an
ejectment for lands in the county of Dublin,
and yet the trial is at the King's court in the
county of the city of Dublin.

Strange contra. This Court will not take
notice that they are distinct counties, but
rather intend the city to be part of the county,
that the county of the city of Dublin is the
county in which the city of Dublin lies. Or
if they should, yet the trial may be right, for
it runs *postea die et loco infra content'*, which
locus infra contentus may be as well the place
within the county of Dublin where the de-
mise is laid to be made, as any other.

Or

Or admitting it a trial out of the proper county, yet it is helped by the 16 and 17 *Car. II. c. 8.* which is enacted in *Ireland* by 17 and 18 *Car. II. c. 12.* being a trial by a jury of the proper county, for the award of the *venire* is previous to any mention of the county of the city, and commands the sheriff of the county to summon twelve men of his county, and then the trial is had by the *juratores unde infra fit mentio.*

If this be not right, there never was a proper trial of any cause arising in the county of *Dublin*; for the King's courts sitting in the city of *Dublin*, it is there all the trials of those causes are had: just as here, where causes of *Middlesex* are tried in the same place where the King's Bench sits. We have instances in *England* of county causes being tried in cities which are counties also, as at *Worcester*, where both are tried in the same place.

The Court said, they must intend them distinct counties; but as to the other points, they went over to be inquired into. And afterwards,

In answer to the objection made the last term, that the lands lay in the county of *Dublin*, and the trial was in the county of the city of *Dublin*, *Strange* now cited an act of parliament made in *Ireland* 17 and 18 *Car. II. c. 20.* which appoints the trial of causes arising in the county of *Dublin* to be at *Nisi prius* in the same place where the King's courts sit, in the county of the city of *Dublin*. So the judgment was affirmed.

N. B. There being such an express act of parliament, I thought it not necessary to put it on the former foot of being a trial by a jury

Vide ante.

Carth. 448.

jury of the proper county, which would have been a sufficient answer : for *Pasch. 10 W. III. B. R. Lady Calverley v. Sir Richard Leving*, in covenant, the case was sent into the county palatine of *Chester*, on a local plea of a matter arising in the county of the city of *Chester* : the *mittimus* to the *C. J.* was to award a *venire* to the sheriff of the county of *Chester*, which was done accordingly ; and after verdict *pro quer*, moved by *Sir Barth. Shower*, in arrest of judgment, that this is a mis-trial, not aided by the statute of *Jeofails* ; being a trial in a wrong county : but the Court held it was aided : and that is a stronger case than this, where it appears the trial was by a jury of the proper county, as it was not in that case ; and in delivering the resolution of the Court, *Holt C. J.* cited *Chew. v. Brigs* in *B. R.* where he said it had been so held likewise, and so is *1 Saund. 246. Craft v. Boite.*

At Guildhall *coram Eyre, C. J. de C. B.*

Shelling v. Farmer. M. 12 Geo. C. B.

1 Stra. 646.
Seising an
house in the
East Indies is
not triable here.

In an action of trespass and imprisonment for facts done in the *East Indies*, the plaintiff laid them all (being transitory) in *London*, and *inter alia* declared for seising the plaintiff's house, situate *apud London praed' in parochia et warda praed'*. It was objected *pro def'* that the trespass as to the house was local, and they could not give evidence of seising a house in the *East Indies*. And *Eyre, C. J.* refused to let the plaintiff give evidence as to the house, comparing it to the case of rent for a house at *Barbadoes*, where it has been held you may bring covenant for the rent in *England*, but an action of debt, which is local, cannot be brought here.

Vide Post.
Mostyn and Fabrigas.

On

On the 8th of June, in last term, *Mr. Justice Gould* came personally into Court, to acknowledge his seal affixed to a bill of exceptions in this case; and errors having been assigned thereupon, they were now argued.

This was an action of trespass, brought in the court of Common Pleas, by *Anthony Fabrigas* against *John Mostyn*, for an assault and false imprisonment; in which the plaintiff declared, that the defendant on the 1st of September, in the year 1771, with force and arms, &c. made an assault on the said *Anthony*, at *Minorca*, (to wit) at *London* aforesaid, in the parish of *St. Mary-le-Bow*, in the ward of *Cheap*, and beat, wounded, and ill-treated him, and then and there imprisoned him, and kept and detained him in prison there for a long time, (to wit, for the space of ten months) without any reasonable or probable cause, contrary to the laws and customs of this realm, and against the will of the said *Anthony*, and compelled him to depart from *Minorca* aforesaid, where he was then dwelling and resident, and carried, and caused to be carried, the said *Anthony* from *Minorca* aforesaid to *Carthagena*, in the dominions of the King of *Spain*, &c. to the plaintiff's damage of £. 10,000.

The defendant pleaded, 1st, Not Guilty; upon which issue was joined. 2dly, A special justification, that the defendant at the time when, &c. and long before, was governor of the same island of *Minorca*, and during all that time was invested with, and did exercise, all the powers, privileges, and authorities, civil and military, belonging to the government of the said island of *Minorca*, in parts beyond the seas; and the said *Anthony*, before the said

Mostyn v. Fabrigas.
M. 15 Geo. III.
B.R. Cowp. 161.

1774,
Tues. Nov. 14.
Trespass and false imprisonment lies in England by a native Minorquin against a governor of Minorca, for such injury committed by him in Minorca.

said time when, &c. (to wit) on the said 1st
 of *September*, in the year aforesaid, at the
 island of *Minorca* aforesaid, was guilty of a
 riot, and was endeavouring to raise a mutiny
 among the inhabitants of the said island, in
 breach of the peace: whereupon the said
John, so being governor of the said island of
Minorca as aforesaid, at the said time, when,
 &c. in order to preserve the peace and go-
 vernment of the said island, was obliged to,
 and did then and there order the said *Anthony*
 to be banished from the said island of *Mi-
 norca*; and in order to banish the said *An-
 thony*, did then and there gently lay hands
 upon the said *Anthony*, and did then and
 there seize and arrest him, and did keep and
 detain the said *Anthony*, before he could be
 banished from the said island, for a short
 space of time, (to wit) for the space of six
 days then next following; and afterwards
 (to wit) on the 7th of *September*, in the
 year aforesaid, at *Minorca* aforesaid, did car-
 ry, and cause to be carried, the said *Anthony*,
 on board a certain vessel, from the island of
Minorca aforesaid to *Carthagera* aforesaid, as
 it was lawful for him to do, for the cause
 aforesaid; which are the same making the said
 assault upon the said *Anthony*, in the first count
 of the said declaration mentioned, and beating
 and ill-treating him, and imprisoning him,
 and keeping and detaining him in prison for
 the said space of time, in the said first count of
 the said declaration mentioned, and compelling
 the said *Anthony* to depart from *Minorca* aforesaid,
 and carrying, and causing to be carried,
 the said *Anthony* from *Minorca* to *Carthagera*,
 in the dominions of the King of *Spain*, where-
 of the said *Anthony* has above complained
 against

against him, and this he is ready to verify ; wherefore he prays judgment, &c. without this, that the said *John* was guilty of the said trespass, assault, and imprisonment, at the parish of *St. Mary le Bow*, in the ward of *Cheap*, or elsewhere, out of the said island of *Minorca* aforesaid. Replication *de injuria sua propria absq. tali causa*. At the trial the jury gave a verdict for the plaintiff, upon both issues, with £. 3000 damages, and £. 90 costs.

The substance of the evidence, as stated by the bill of exceptions, was as follows :—On behalf of the plaintiff, that the defendant, at the island of *Minorca*, on the 17th of *September* 1771, seized the plaintiff, and, without any trial, imprisoned him for the space of six days against his will, and banished him for the space of twelve months from the said island of *Minorca* to *Carthagera* in *Spain*. On behalf of the defendant ; that the plaintiff was a native of *Minorca*, and at the time of seizing, imprisoning, and banishing him as aforesaid, was an inhabitant of and residing in the *Arraval* of *St. Phillip's*, in the said island ; that *Minorca* was ceded to the crown of *Great Britain*, by the treaty of *Utrecht*, in the year 1713. That the *Minorquins* are in general governed by the *Spanish* laws, but when it serves their purpose plead the *English* laws ; that there are certain magistrates, called the chief justice criminal, and the chief justice civil, in the said island ; that the said island is divided into four districts, exclusive of the *Arraval* of *St. Phillip's* ; which the witness always understood to be separate and distinct from the others, and under the immediate order of the governor ; so that no magistrate of *Mahon* could go there

to exercise any function, without leave first had from the governor: that the *Arraval* of *St. Phillip's* is furrounded by a line wall on one side, and on the other by the sea, and is called the *Royalty*, where the governor has greater power than any where else in the island; and where the judges cannot interfere but by the governor's consent; that nothing can be executed in the *Arraval* but by the governor's leave, and the judges have applied to him, the witness, for the governor's leave to execute process there. That for the trial of murder and other great offences committed within the said *Arraval*, upon application to the governor, he generally appoints the *asseffeur* criminal of *Mabon*, and for lesser offences, the *Mustastaph*; and that the said *John Mostyn*, at the time of the seising, imprisoning, and banishing the said *Anthony*, was the governor of the said island of *Minorca*, by virtue of certain letters patent of his present Majesty. Being so governor of the said island, he caused the said *Anthony* to be seised, imprisoned, and banished as aforesaid, without any reasonable or probable cause, or any other matter alleged in his plea, or any act tending thereto.

This case was argued this term, by Mr. *Bulter*, for the plaintiff in error, and Mr. *Peckham*, for the defendant. Afterwards, in Hilary term 1775, by Mr. Serjeant *Walker*, for the plaintiff, and Mr. Serjeant *Glynn*, for the defendant.

For the plaintiff in error. There are two questions, 1st. Whether in any case an action can be maintained in this country for an imprisonment at *Minorca*, upon a native of that place?

2dly.

2dly. Supposing an action will lie against any other person, whether it can be maintained against the Governor, acting as such in the peculiar district of the *Arraval* of *St. Phillip's*?

In the discussion of both these questions, the constitution of the island of *Minorca*, and of the *Arraval* of *St. Phillip's*, are material. Upon the record it appears, that by the treaty of *Utrecht*, the inhabitants had their own property and laws preserved to them. The record further states, that the *Arraval* of *St. Phillip's*, where the present cause of action arose, is *subject* to the immediate *controul* and order of the *governor only*, and that no judge of the island can execute any function there, without the particular leave of the governor for that purpose. 1st. If that be so, and the *lex loci* differs from the law of this country; the *lex loci* must decide, and not the law of this country. The case of *Robinson versus Bland*, 2 *Bur.* 1078, does not interfere with this position; for the doctrine laid down in that case is, that where a transaction is entered into between *British* subjects with a view to the *law of England*, the law of the *place* can never be the rule which is to govern. But where an act is done, as in this case, which by the law of *England* would be a crime, but in the country where it is committed is no crime at all; the *lex loci* cannot be the rule. It was so held by Lord *C. J. Pratt*, in the case of *Pons versus Johnson*, sittings after Trinity term 1765.

2d. In criminal cases, an offence committed in foreign parts, cannot, except by particular statutes, be tried in this country. 1st *Vezey*, 246. The *East India Company versus Campbell*. If crimes committed abroad cannot be tried here, much less ought civil injuries, be-

cause the latter depend upon the police and constitution of the country where they occur, and the same conduct may be actionable in one country which is justifiable in another. But in crimes, as murder, perjury, and many other offences, the laws of most countries take for their basis, the law of God and the law of nature; and therefore, though the trial be in a different country from that in which the offence was committed, there is a greater probability of distributing equal justice in such cases than in civil actions. In *Keilway* 202. it was held that the court of *Chancery* cannot entertain a suit for dower, in the *Isle of Man*, though it is part of the territorial dominions of the crown of *England*.

3d. The cases where the courts of *Westminster* have taken cognizance of transactions arising abroad, seem to be wholly on contracts, where the laws of the foreign country have agreed with the laws of *England*, and between *English* subjects; and even there it is done by a legal fiction; namely, by supposing under a *videlicet*, that the cause of action did arise within this country, and that the place abroad lay either in *London* or *Islington*. But where it appears upon the face of the record, that the cause of action did arise in foreign parts, there it has been held that the Court has no jurisdiction, 2 *Lutw.* 946. Assault and false imprisonment of the plaintiff, at *Fort St. George*, in the *East Indies*, in parts beyond the seas; *videlicet*, at *London*, in the parish of *St. Mary le Bow*, in the ward of *Cheap*—It was resolved, by the whole Court, that the declaration was ill, because the trespass is supposed to be committed at *Fort St. George*, in parts beyond the seas, *videlicet*, in *London*; which
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is repugnant and absurd : and it was said, by the Chief Justice, that if a bond *bore date* at *Paris*, in the kingdom of *France*; it is not triable here. In the present case, it does appear upon the record, that the offence complained of was committed in parts beyond the seas, and the defendant has concluded his plea with a traverse, that he was not guilty in *London*, in the *parish* of *St. Mary le Bow*, or elsewhere, *out* of the island of *Minorca*. Besides, it stands admitted by the plaintiff; because if he had thought fit to have denied it, he should have made a new assignment, or have taken issue on the place. Therefore, as Justice *Dodderidge* says, in *Latch*. 4. the Court must take notice, that the cause of action arose out of their jurisdiction.

Before the statute of *Jeofails*, even in cases the most transitory, if the cause of action was laid in *London*, and there was a local justification, as at *Oxford*, the cause must have been tried at *Oxford*, and not in *London*. But the statute of *Jeofails* does not extend to *Minorca*: therefore this case stands entirely upon the common law; by which the trial is bad, and the verdict void.

The inconveniences of entertaining such an action in this country are many, but none can attend the rejecting it. For it must be determined by the law of this country, or by the law of the place where the act was done. If by our law, it would be the highest injustice, by making a man who has regulated his conduct by one law, amenable to another totally opposite. If by the law of *Minorca*, how is it to be proved? There is no legal mode of certifying it, no process to compel the attendance of witnesses, nor means to make them answer.

The consequence would be, to encourage every disaffected or mutinous soldier to bring actions against his officer, and to put him upon his defence, without the power of proving either the law or the facts of his case.

II. Point. If an action would lie against any other person, yet it cannot be maintained against the Governor of *Minorca*, acting as such, within the *Arraval of St. Phillip's*.

The governor of *Minorca*, at least within the district of *St. Phillip's*, is absolute: both the civil and criminal jurisdiction vest in him as the *supreme power*, and as such he is accountable to none but God. But supposing he were not absolute, in this case, the act complained of was done by him in a judicial capacity as criminal judge; for which no man is answerable. 1 *Salk.* 396. *Groënveldt versus Burwell*. 2 *Mod.* 218. *Show. Parl. cases* 24. *Dutton versus Howell*, are in point to this position; but more particularly the last case; where in trespass, assault, and false imprisonment, the defendant justified as governor of *Barbadoes*, under an order of the council of state in *Barbadoes*, made by himself and the council, against the plaintiff (who was the deputy governor) for mal-administration in his office; and the House of Lords determined, that the action would not lie here. All the grounds and reasons urged in that case, and all the inconveniences pointed out against that action hold strongly in the present. This is an action brought against the defendant for what he did as Judge; all the records and evidence which relate to the transaction are in *Minorca*, and cannot be brought here; the laws there are different from what they are in this country; and as it is said in the conclusion of that argument,

ment, government must be very weak indeed, and the persons entrusted with it very uneasy, if they are subject to be charged with actions here, for what they do in that character in those countries. Therefore, unless that case can be materially distinguished from the present, it will be an authority, and the highest authority that can be adduced, to shew that this action cannot be maintained; and that the plaintiff in error is entitled to the judgment of the Court.

Mr. *Peckham*, for the defendant in error.

First. The objection to the jurisdiction is now too late; for wherever a party has once submitted to the jurisdiction of the Court, he is for ever after precluded from making any objection to it. *Year Book* 22. *H. VI.* fol. 7. *Co. Litt.* 127. *b.* *T. Raym.* 34. 1 *Mod.* 81. 2 *Mod.* 273. 2 *Lord Raym.* 884. 2 *Vern.* 483.

Secondly, An action of trespass can be brought in *England* for an injury done abroad. It is a transitory action, and may be brought any where. *Co. Litt.* 282. 12 *Co.* 114. *Co. Litt.* 261. *b.* where *Lord Coke* says, that an obligation made beyond seas, at *Bourdeaux* in *France*, may be sued here in *England*, in what place the plaintiff will. Captain *Parker* brought an action of trespass and false imprisonment against *Lord Clive* for injuries received in *India*, and it was never doubted but that the action did lie. And at this time there is an action depending between *Gregory Cojimaul*, an *Armenian* merchant, and Governor *Verelst*, in which the cause of action arose in *Bengal*. A bill was filed by the Governor in the *Exchequer* for an injunction, which was granted; but on appeal to the House of Lords, the injunction was dissolved; therefore the supreme court of

judicature, by dissolving the injunction, acknowledged that an action of trespass could be maintained in *England*, though the cause of action arose in *India*.

Thirdly, There is no disability in the plaintiff which incapacitates him from bringing this action. Every person born within the ligeance of the king, though without the realm, is a natural born subject; and as such, is entitled to sue in the king's courts. *Co. Litt.* 129. The plaintiff, though born in a conquered country, is a subject, and within the ligeance of the king. *2 Burr.* 858.

In *1 Salk.* 404. Upon a bill to foreclose a mortgage in the island of *Sarke*, the defendants pleaded to the jurisdiction, *viz.* that the island was governed by the laws of *Normandy*, and that the party ought to sue in the courts of the island, and appeal. But Lord Keeper *Wright* over-ruled the plea; "otherwise there might be a failure of justice if the Chancery could not hold plea in such case, the party being here." In this case both the parties are upon the spot. In the case of *Ramkissenseat versus Barker*, upon a bill filed against the representatives of the governor of *Patna*, for money due to him as his *Banyan*; the defendant pleaded, that the plaintiff was an alien born, and an alien infidel, and therefore could have no suit here. But Lord *Hardwicke* said, "as the plaintiff's was a mere personal demand, it was extremely clear that he might bring a bill in this Court;" and he over-ruled the defendant's plea without hearing one counsel of the other side.

The case of the Countess of *Derby*, *Keilway* 202. does not affect the present question; for that was a claim of dower; which is a *local* action, and cannot, as a transitory action, be tried

tried any where. The other cases from *Latch* and *Lutwyche*, were either local actions, or questions upon demurrer; therefore not applicable to the case before the Court; for a party may avail himself of many things upon a demurrer, which he cannot by a writ of error. The true *distinction* between *transitory* and *local* actions is, the former may be tried any where; the latter cannot, and this is a transitory action. But there is one case which more particularly points out the distinction, which is the case of Mr. *Skinner*, referred to the twelve Judges from the Council-board. In the year 1657, when trade was open to the *East Indies*, he possessed himself of a house and warehouse, which he filled with goods at *Jamby*; and he purchased of the king at *Great Jamby* the islands of *Baretha*. The agents of the *East India Company* assaulted his person, seized his warehouse, carried away his goods, and took and possessed themselves of the islands of *Baretha*. Upon this case it was propounded to the Judges, by an order from the King in council, dated the 12th *April*, 1665, "Whether Mr. *Skinner* could have a full relief in any ordinary court of law?" Their opinion was, "That his Majesty's ordinary courts of justice at *Westminster* can give relief for taking away and spoiling his ship, goods and papers, and assaulting and wounding his person, notwithstanding the same was done beyond the seas. But that as to the detaining and possessing the house and islands in the case mentioned, he is not relievable in any ordinary court of justice." It is manifest from this case, that the twelve Judges held, that an action might be maintained here for spoiling his goods, and seizing his person, because an action of trespass is a

transitory

transitory action; but an action could not be maintained for possessing the house and land, because it is a *local* action.

Fourth Point. It is contended that General *Mostyn* governs as all absolute sovereigns do, and that *set pro ratione voluntas* is the only rule of his conduct. From whom does the governor derive this despotism? Not from the king, for the king has no such power, and therefore cannot delegate it to another. Many cases have been cited, and much argument has been adduced to prove that a man is not responsible in an action for what he has done as a Judge; and the case of *Dutton versus Howell* has been much dwelt upon; but that case has not the least resemblance to the present. The ground of that decision was, that Sir *John Dutton* was acting with his council in a judicial capacity, in a matter of public accusation, and agreeable to the laws of *Barbadoes*, and only let the law take its course against a criminal. But Governor *Mostyn* neither sat as a military or as a civil judge; he heard no accusation, he entered into no proof; he did not even see the prisoner; but in direct opposition to all laws, and in violation of the first principles of justice, followed no rule but his own arbitrary will, and went out of his way to persecute the innocent. If that be so, he is responsible for the injury he has done: and so was the opinion of the court of *C. B.* as delivered by Lord Chief Justice *De Grey* on the motion for a new trial. If the governor had secured him, said his Lordship, nay, if he had barely committed him, that he might have been amenable to justice; and if he had immediately ordered a prosecution upon any part of his conduct, it would have been another question; but the governor knew he could no more imprison him for a
twelve-

twelvemonth (and the banishment for a year is a continuation of the original imprisonment) than that he could inflict the torture. Lord *Bellamont's* case, 2 *Salk.* 625. *Pas.* 12. *W.* 3. Vide Post XI. is a case in point to shew that a governor abroad is responsible here: and the stat. 12 *W.* 3. passed the same year, for making governors abroad amenable here in *criminal* cases, affords a strong inference that they were already answerable for *civil* injuries, or the legislature would at the same time have provided against that mischief. But there is a late decision not distinguishable from the case in question, *Comyn versus Sabine*, governor of *Gibraltar*, *Mich.* 11. *Geo.* 2. The declaration stated, that the plaintiff was a master carpenter of the office of ordnance at *Gibraltar*; that Governor *Sabine* tried him by a court-martial to which he was not subject, that he underwent a sentence of 500 lashes; and that he was compelled to depart from *Gibraltar*, which he laid to his damage of £. 10,000. The defendant pleaded not guilty, and justified under the sentence of the court-martial. There was a verdict for the plaintiff, with £. 700. damages. A writ of error was brought, but the judgment affirmed.

With respect to the *Arraval of St. Phillip's* being a peculiar district under the immediate authority of the governor alone, the opinion of Lord Chief Justice *De Grey* upon the motion for a new trial, is a complete answer: " One of
 " the witnesses in the cause (said his Lordship)
 " represented to the jury, that in some particular cases, especially in criminal matters,
 " the governor resident upon the island, does
 " exercise a legislative power. It was gross
 " ignorance in that person to imagine such a
 " thing;

“ thing ; I may say it was impossible, that a
 “ man who lived upon the island in the station
 “ he had done, should not know better, than
 “ to think that the governor had a civil and
 “ criminal power in him. The governor is
 “ the king’s servant ; his commission is from
 “ him, and he is to execute the power he is
 “ invested with under that commission ; which
 “ is, to execute the laws of *Minorca*, under
 “ such regulations as the king shall make in
 “ council. It was a vain imagination in the
 “ witnesses to say, that there were five *terminos*
 “ in the island of *Minorca* ; I have, at various
 “ times, seen a multitude of authentic docu-
 “ ments and papers relative to that island, and
 “ I do not believe that in any one of them,
 “ the idea of the *Arraval of St. Phillip’s* being
 “ a distinct jurisdiction, was ever started.
 “ *Mabon* is one of the four *terminos*, and *St.*
 “ *Phillip’s*, and all the district about it, is
 “ comprehended within that *termino* ; but to
 “ suppose that there is a distinct jurisdiction,
 “ separate from the government of the island,
 “ is ridiculous and absurd.” Therefore as the
 defendant, by pleading in chief, and submit-
 ting his cause to the decision of an *English* jury,
 is too late in his objection to the jurisdiction of
 the Court ; as no disability incapacitates the
 plaintiff from seeking redress here ; and as the
 action which is a transitory one is clearly main-
 tainable in this country, though the cause of
 action arose abroad, the judgment ought to be
 affirmed. Should it be reversed, I fear the
 public, with too much truth, will apply the
 lines of the Roman satirist on the drunken
Marius to the present occasion ; and they will
 say of Governor *Moslyn*, as was formerly said
 of him,

Hic

Hic est damnatus inani judicio;

and to the *Minorquins*, if Mr. *Fabrigas* should be deprived of that satisfaction in damages which the jury gave him,

At tu vilis provincia ploras.

LORD MANSFIELD. Let it stand for another argument. It has been extremely well argued on both sides.

On *Friday 27th January, 1755*, it was very ably argued by Mr. Serjeant *Glynn*, for the plaintiff, and by Mr. Serjeant *Walker* for the defendant.

LORD MANSFIELD. This is an action brought by the plaintiff against the defendant, for an assault and false imprisonment; and part of the complaint made, being for banishing him from the island of *Minorca* to *Carthagena* in *Spain*, it was necessary for the plaintiff, in his declaration, to take notice of the real place where the cause of action arose; therefore he has stated it to be in *Minorca*; with a *videlicet*, at *London*, in the parish of *St. Mary le Bow*, in the ward of *Cheap*. Had it not been for that particular requisite, he might have stated it to have been in the county of *Middlesex*. To this declaration the defendant put in two pleas. *First*, "not guilty;" secondly, that he was Governor of *Minorca* by letters patent from the Crown; that the plaintiff was raising a sedition and mutiny; and that in consequence of such sedition and mutiny, he did imprison him, and send him out of the island; which as Governor, being invested with all the privileges, rights, &c. of governor, he alledges he had a right to do. To this plea the plaintiff does not demur, nor does he deny that it

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would

would be a justification in case it were true : but he denies the truth of the *fact* ; and puts in issue whether the *fact* of the plea is true. The plea avers that the assault for which the action was brought arose in the island of *Minorca*, out of the realm of *England*, and no where else. To this the plaintiff has made no new assignment, and therefore by his replication he *admits* the *locality* of the cause of action.

Thus it stood on the pleadings. At the trial the plaintiff went into the evidence of his case, and the defendant into evidence of his ; but on behalf of the defendant, evidence different from the facts alledged in his plea of justification was given, to shew that the *Arraval* of *St. Phillip's*, where the injury complained of was done, was not within either of the four precincts, but is a district of itself, more immediately under the power of the governor ; and that no judge of the island can exercise jurisdiction there, without a special appointment from him. Upon the facts of the case the judge left it to the jury, who found a verdict for the plaintiff, with £. 3000 damages. The defendant has tendered a bill of exceptions, upon which bill of exceptions the cause comes before us ; and the great difficulty I have had upon both the arguments, has been to be able clearly to comprehend what the question is, which is meant seriously to be brought before the Court.

If I understand the counsel for Governor *Mostyn* right, what they say is this : the plea of not guilty is totally immaterial ; and so is the plea of justification, because upon the plaintiff's own shewing it appears, 1st, that the cause of action arose in *Minorca*, out of the

realm; 2dly, that the defendant was governor of *Minorca*, and by virtue of such his authority imprisoned the plaintiff. From thence it is argued, that the Judge who tried the cause ought to have refused any evidence whatsoever, and have directed the Jury to find for the defendant: and three reasons have been assigned. One, insisted upon in the former argument, was, that the plaintiff, being a *Minorquin*, is incapacitated from bringing an action in the king's courts in *England*. To dispose of that objection at once, I shall only say, it is wisely abandoned to-day; for it is impossible there ever could exist a doubt, but that a subject born in *Minorca*, has as good a right to appeal to the king's courts of justice, as one who is born within the sound of *Bow* bell: and the objection made in this case, of its not being stated on the record that the plaintiff was born since the treaty of *Utrecht*, makes no difference. The two other grounds are, 1st, that the defendant being governor of *Minorca*, is answerable for no injury whatsoever done by him in that capacity: 2dly, that the injury being done at *Minorca*, out of the realm, is not cognizable by the king's courts in *England*. —As to the first, nothing is so clear as that to an action of this kind the defendant, if he has any justification, must plead it; and there is nothing more clear, than that if the Court has not a *general jurisdiction* of the subject-matter, he must *plead* to the *jurisdiction*, and cannot take advantage of it upon the *general issue*. Therefore by the law of *England*, if an action be brought against a judge of record for an act done by him in his judicial capacity, he may plead that he did it as judge of record, and that will be a complete justification. So in this case,

case, if the injury complained of had been done by the defendant as a Judge, though it arose in a foreign country where the technical distinction of a Court of Record does not exist, yet sitting as a Judge in a court of justice, subject to a superior review, he would be within the reason of the rule, which the law of *England* says shall be a justification; but then it must be pleaded. Here no such matter is pleaded, nor is it even in evidence that he sat as Judge of a court of justice. Therefore I lay out of the case every thing relative to the *Arraval* of *St. Phillip's*.

The *first* point then upon this ground is, the sacredness of the defendant's person as Governor. If it were true that the law makes him that sacred character, he must plead it, and set forth his commission as special matter of justification; because *prima facie* the Court has jurisdiction. But I will not rest the answer upon that only. It has been insisted, by way of distinction, that supposing an action will lie for an injury of this kind committed by one individual against another, in a country beyond the seas, but within the dominion of the crown of *England*, yet it shall *not emphatically* lie against the governor. In answer to which I say, that for many reasons, if it did not lie against any other man, it shall *most emphatically* lie against the governor.

In every plea to the jurisdiction, you must state another jurisdiction; therefore if an action is brought here for a matter arising in *Wales*, to bar the remedy sought in this Court, you must shew the jurisdiction of the court of *Wales*; and in every case to repel the jurisdiction of the king's court, you must shew a more proper and more sufficient jurisdiction: for if there

there is no other mode of trial, that alone will give the king's courts a jurisdiction. Now in this case no other jurisdiction is shewn, even so much as in argument. And if the king's courts of justice cannot hold plea in such case, no other court can do it. For it is truly said that a governor is in the nature of a viceroy; and therefore *locally, during his government*, no civil or criminal action will lie against him: the reason is, because upon process he would be subject to imprisonment. But here, the injury is said to have happened in the *Arraval* of *St. Phillip's*, where without his leave no jurisdiction can exist. If that be so, there can be no remedy whatsoever, if it is not in the king's courts: because when he is out of the government, and is returned with his property into this country, there are not even his effects left in the island to be attached.

Another very strong reason, which was alluded to by Mr. Serjeant *Glynn*, would alone be decisive; and it is this: That though the charge brought against him is for a *civil* injury, yet it is likewise of a *criminal nature*; because it is in *abuse* of the authority delegated to him by the *king's letters patent*, under the great seal. Now if every thing committed within a dominion, is triable by the courts within that dominion, yet the effect or extent of the *king's letters patent*, which gave the authority, can only be tried in the king's courts; for no question concerning the seignory, can be tried within the seignory itself. Therefore, where a question respecting the seignory arises in the proprietary governments, or between two provinces of *America*, or in the *Isle of Man*, it is cognizable by the king's courts in *England* only. In the case of the *Isle of Man* * it was so

* 4 Inst. 284.

decided in the time of Queen *Elizabeth*, by the chief justice and many of the judges. So that *emphatically* the governor must be tried in *England*, to see whether he has exercised the authority delegated to him by the *letters patent*, legally and properly; or whether he has abused it, in violation of the laws of *England*, and the trust so reposed in him.

It does not follow from hence, that let the cause of action arise where it may, a man is not entitled to make use of every justification his case will admit of, which ought to be a defence to him. If he has acted right according to the authority with which he is invested, he must lay it before the Court by way of plea, and the Court will exercise their judgment whether it is a sufficient justification or not. In this case, if the justification had been proved, the Court might have considered it as a sufficient answer; and, if the nature of the case would have allowed of it, might have adjudged, that the raising a mutiny was a good ground for such a summary proceeding. I can conceive cases in time of war in which a governor would be justified, though he acted very arbitrarily, in which he could not be justified in time of peace. Suppose, during a siege, or upon an invasion of *Minorca*, the governor should judge it proper to send an hundred of the inhabitants out of the island, from motives of *real* and *general expediency*; or suppose, upon a general suspicion he should take people up as spies; upon proper circumstances laid before the Court, it would be very fit to see whether he had acted as the governor of a garrison ought, according to the circumstances of the case. But it is objected, supposing the defendant to have acted as the *Spanish*

nish governor was empowered to do before, how is it to be known here that by the laws and constitution of *Spain* he was authorised so to act. The way of knowing foreign laws is, by admitting them to be *proved* as *facts*, and the Court must assist the Jury in ascertaining what the law is. For instance, if there is a *French* settlement, the construction of which depends upon the custom of *Paris*, witnesses must be received to explain what the custom is; as evidence is received of customs in respect of trade. There is a case of the kind I have just stated*. So in the supreme resort before the king in council, the privy council determines all cases that arise in the plantations, in *Gibraltar* or *Minorca*, in *Jersey* or *Guernsey*; and they inform themselves, by having the law stated to them.—As to suggestions with regard to the difficulty of bringing witnesses, the Court must take care that the defendant is not surprised, and that he has a fair opportunity of bringing his evidence, if it is a case proper in other respects for the jurisdiction of the Court. There may be some cases arising abroad, which may not be fit to be tried here; but that cannot be the case of a governor, injuring a man contrary to the duty of his office, and in violation of the trust reposed in him by the king's commission.

If he wants the testimony of witnesses whom he cannot compel to attend, the Court may do what this Court did in the case of a criminal prosecution of a woman who had received a pension as an officer's widow: and it was charged in the indictment, that she never was married to him. She alleged a marriage in *Scotland*, but that she could not compel her witnesses to come up, to give evidence. The

* Foreign laws must be proved as facts.

Feaubert v.
Turft, Prec.
Chan. 207.

Court obliged the prosecutor to consent that the witnesses might be examined before any of the judges of the Court of Session, or any of the barons of the Court of Exchequer in *Scotland*, and that the depositions so taken should be read at the trial. And they declared, that they would have put off the trial of the indictment from time to time, for ever, unless the prosecutor had so consented. The witnesses were so examined before the Lord President of the Court of Session.

It is a matter of course in aid of a trial at law, to apply to a court of equity, for a commission and injunction in the mean time; and where a real ground is laid, the Court will take care that justice is done to the defendant, as well as to the plaintiff. Therefore in every light in which I see the subject, I am of opinion that the action holds *emphatically* against the governor, if it did not hold in the case of any other person. If so, he is accountable in this Court, or he is accountable no where; for the king in council has no jurisdiction. Complaints made to the king in council tend to remove the governor, or to take from him any commission, which he holds during the pleasure of the Crown. But if he is in *England*, and holds nothing at the pleasure of the Crown, they have no jurisdiction to make reparation, by giving damages, or to punish him in any shape, for the injury committed. Therefore to lay down in an *English* court of justice such a monstrous proposition, as that a governor acting by virtue of *letters patent* under the great seal, is accountable only to God, and his own conscience; that he is absolutely despotic, and can spoil, plunder, and affect his Majesty's subjects, both in their liberty and property, with impunity,

punishment, is a doctrine that cannot be maintained.

In Lord *Bellamont's* case, 2 *Salk.* 625, cited by Mr. *Peckham*, a motion was made for a trial at bar, and granted, because the *Attorney General* was to defend it on the part of the king; which shews plainly that such an action existed. And in *Way versus Yally*, 6 *Mod.* 195. Justice *Powell* says, that an action of false imprisonment has been brought here, against a governor of *Jamaica*, for an imprisonment there, and the laws of the country were given in evidence. The Governor of *Jamaica* in that case never thought that he was not amenable. He defended himself, and possibly shewed, by the laws of the country, an act of the assembly which justified that imprisonment, and the Court received it as they ought to do. For whatever is a justification in the place where the thing is done, ought to be a justification where the case is tried.—I remember, early in my time, being counsel in an action brought by a carpenter in the train of artillery, against Governor *Sabine*, who was governor of *Gibraltar*, and who had barely confirmed the sentence of a court-martial, by which the plaintiff had been tried, and sentenced to be whipped. The Governor was very ably defended, but nobody ever thought that the action would not lie; and it being proved at the trial, that the tradesmen who followed the train, were not liable to martial law; the Court were of that opinion, and the Jury accordingly found the defendant guilty of the trespass, as having had a share in the sentence; and gave £. 500 damages.

The next objection which has been made, is a general objection, with regard to the mat-

ter arising abroad ; namely, that as the cause of action arose abroad, it cannot be tried here in *England*.

Where an action must be laid in the proper county.

There is a *formal* and *substantial* distinction as to the *locality* of trials. I state them as different things : the *substantial* distinction is, where the proceeding is *in rem*, and where the effect of the judgment cannot be had, if it is laid in a wrong place. That is the case of all ejectments, where possession is to be delivered by the *Sheriff* of the *county* ; and as trials in *England* are in particular counties, the officers are county officers ; therefore the judgment could not have effect, if the action was not laid in the proper county.

With regard to matters that arise *out* of the realm, there is a substantial distinction of locality too ; for there are some cases that arise out of the realm, which ought not to be tried any where but in the country where they arise ; as in the case alluded to by Serjeant *Walker* : if two persons fight in *France*, and both happening casually to be here, one should bring an action of assault against the other, it might be a doubt whether such an action could be maintained here ; because, though it is not a criminal prosecution, it must be laid to be against the peace of the King ; but the breach of the peace is merely local, though the trespass against the person is transitory. Therefore without giving any opinion, it might perhaps be triable only where both parties at the time were subjects. So if an action were brought relative to an estate in a foreign country, where the question was a matter of title only, and not of damages, there might be a solid distinction of locality.

But

But there is likewise a *formal* distinction, which arises from the mode of trial: for trials in *England* being by jury, and the kingdom being divided into counties, and each county considered as a separate district or principality, it is absolutely necessary that there should be some county where the action is brought in particular, that there may be a process to the sheriff of that county, to bring a jury from thence to try it. This matter of form goes to all cases that arise abroad: but the law makes a distinction between *transitory* actions and *local* actions. If the matter which is the cause of a transitory action arises within the realm, it may be laid in any county, the place is not material; and if an imprisonment in *Middlesex* it may be laid in *Surry*, and though proved to be done in *Middlesex*, the place not being material, it does not at all prevent the plaintiff recovering damages: the place of transitory actions is never material, except where by particular acts of parliament it is made so; as in the case of churchwardens and constables, and other cases which require the action to be brought in the county. The parties, upon sufficient ground, have an opportunity of applying to the Court in time to change the *venue*; but if they go to trial without it, that is no objection. So all actions of a transitory nature that arise abroad may be laid as happening in an *English* county. But there are occasions which make it absolutely necessary to state in the declaration, that the cause of action really happened abroad; as in the case of specialties, where the date must be set forth. If the declaration states a specialty to have been made at *Westminster* in *Middlesex*, and upon producing the deed, it bears date at *Bengal*, the action is

gone; because it is such a *variance* between the deed and the declaration as makes it appear to be a *different* instrument. There is some confusion in the books upon the *statute* 6 *Rich. II.* But I do not put the objection upon that statute. I rest it singly upon this ground: If the true date or description of the bond is not stated, it is a variance. But the law has in that case invented a fiction; and has said, the party shall first set out the description truly, and then give a *venue* only for form, and for the sake of trial, by a *videlicet*, in the county of *Middlesex*, or any other county. But no judge ever thought that when the declaration said in *Fort St. George*, viz. in *Cheapside*, that the plaintiff meant it was in *Cheapside*. It is a *fiction* of form; every country has its forms, which are invented for the furtherance of justice; and it is a certain rule, that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted. Now the fiction invented in these cases is barely for the mode of trial; to every other purpose, therefore, it shall be contradicted, but not for the purpose of saying the cause shall not be tried. So in the case that was long agitated, and finally determined some years ago, upon a fiction of the *teste* of writs taken out in the vacation, which bear date as of the last day of the term, it was held, that the fiction shall not be contradicted so as to invalidate the writ, by averring that it issued on a day in the vacation: because the fiction was invented for the furtherance of justice, and to make the writ appear right in form. But where the *true* time of suing out a *latitat* is *material*, as on a plea of *non assumpsit infra*

Fictions of law shall never be contradicted, so as to defeat the end for which they were invented; but for every other purpose they may be contradicted.

2 Burr. 967.

sex

sex annos, there it may be shewn that the *latitat* was sued out *after* the six years, notwithstanding the *teste*. I am sorry to observe, that some sayings have been alluded to, inaccurately taken down, and improperly printed, where the Court has been made to say, that as men they have one way of thinking, and as judges they have another, which is an absurdity; whereas, in fact, they only meant to support the fiction. I will mention a case or two, to shew that that is the meaning of it.

In 6 *Mod.* 228. the case of *Roberts versus Harnage* is thus stated: the plaintiff declared that the defendant became bound to him at *Fort St. David's* in the *East Indies* at *London*, in such a bond; upon demurrer the objection was, that the bond appeared to have been sealed and delivered at *Fort St. David's*, in the *East Indies*, and therefore the date made it local, and, by consequence, the declaration ought to have been of a bond made at *Fort St. David's*, in the *East Indies*, viz. at *Islington*, in the county of *Middlesex*; or in such a ward or parish in *London*, and of that opinion was the whole Court. This is an inaccurate state of the case. But in 2 *Lord Raym.* 1042, it is more truly reported, and stated as follows: It appeared by the declaration, that the bond was made at *London*, in the ward of *Cheap*; upon oyer, the bond was set out, and it appeared upon the face of it to be dated at *Fort St. George* in the *East Indies*; the defendant pleaded the variance in abatement, and the plaintiff demurred, and it was held bad: but the Court said that it would have been good, if laid at *Fort St. George*, in the *East Indies*, to wit, at *London*, in the ward of *Cheap*. The objection there was, that they had laid it falsely;

falsely; for they had laid the bond as made at *London*; whereas, when the bond was produced, it appeared to be made at another place, which was a variance. A case was quoted from *Latch*, and a case from *Lutwyche*, on the former argument; but I will mention a case posterior in point of time, where both those cases were cited, and no regard at all paid to them; and that is the case of *Parker and Crook*, 10 *Mod.* 255. It was an action of covenant upon a deed indented; it was objected to the declaration, that the defendant is said in the declaration to covenant at *Fort St. George*, in the *East Indies*; and upon the oyer of the deed it bore date at *Fort St. George*, and therefore the Court, as was pretended, had no jurisdiction; *Latch. fol. 4. Lutwyche* 950. Lord Chief Justice *Parker* said, that an action will lie in *England* upon a deed dated in foreign parts; or else the party can have no remedy; but then in the declaration a place in *England* must be alledged *pro forma*. Generally speaking, the deed, upon the oyer of it, must be consistent with the declaration; but in these cases, *propter necessitatem*, if the inconsistency be as little as possible, it is not to be regarded; and here the contract being of a voyage which was to be performed from *Fort St. George* to *Great Britain*, does import, that *Fort St. George* is different from *Great Britain*; and after taking time to consider of it in *Hilary* term, the plaintiff had his judgment, notwithstanding the objection. Therefore the whole amounts to this; that where the action is substantially such a one as the Court can hold plea of, as the mode of trial is by jury, and as the jury must be called together by process directed to the sheriff of the county;

county; matter of form is added to the fiction, to say it is in that county, and then the whole of the enquiry is, Whether it is an action that ought to be maintained. But can it be doubted, that actions may be maintained here, not only upon contracts, which follow the person, but for injuries done by subject to subject; especially for injuries where the whole that is prayed is a reparation in damages, or satisfaction to be made by process against the person or his effects, within the jurisdiction of the Court? We know it is within every day's experience. I was embarrassed a great while to find out whether the counsel for the plaintiff really meant to make a question of it. In sea batteries the plaintiff often lays the injury to have been done in *Middlesex*, and then proves it to be done a thousand leagues distant on the other side of the *Atlantic*. There are cases of offences on the high seas, where it is of necessity to lay in the declaration, that it was done upon the high seas; as the taking a ship. There is a case of that sort occurs to my memory; the reason I remember it is, because there was a question about the jurisdiction. There likewise was an action of that kind before Lord Chief Justice *Lee*, and another before me, in which I quoted that determination, to shew, that when the Lords Commissioners of prizes have given judgment, that is conclusive in the action; and likewise when they have given judgment, it is conclusive as to the costs, whether they have given costs or not. It is necessary in such actions to state in the declaration, that the ship was taken, or seized *on the high seas, videlicet, in Cheapside*. But it cannot be seriously contended that the judge and jury who try the cause

cause, fancy the ship is sailing in *Cheapside*: no, the plain sense of it is, that as an action lies in *England* for the ship which was taken on the high seas, *Cheapside* is named as a *venue*; which is saying no more, than that the party prays the action may be tried in *London*. But if a party were at liberty to offer reasons of fact contrary to the truth of the case, there would be no end of the embarrassment. At the last Sittings there were two actions brought by *Armenian* merchants, for assaults and trespasses in the *East Indies*, and they are very strong authorities. Serjeant *Glynn* said, that the defendant, Mr. *Verelst*, was very ably assisted: so he was, and by men who would have taken the objection, if they had thought it maintainable, and the actions came on to be tried after this case had been argued once; yet the counsel did not think it could be supported. Mr. *Verelst* would have been glad to make the objection; he would not have left it to a jury, if he could have stopped them short, and said, You shall not try the actions at all. I have had some actions before me, rather going further than these transitory actions; that is, going to cases which in *England* would be local actions: I remember one, I think it was an action brought against Captain *Gambier*, who by order of Admiral *Boscawen*, had pulled down the houses of some futlers who supplied the navy and sailors with spirituous liquors; and whether the act was right or wrong, it was certainly done with a good intention on the part of the admiral, for the health of the sailors was affected by frequenting them. They were pulled down; the captain was inattentive enough to bring the futler over in his own ship, who would never have got to *England* otherwise;

otherwise; and as soon as he came here he was advised that he should bring an action against the *Captain*. He brought his action, and one of the counts in the declaration was for pulling down the houses. The objection was taken to the count for pulling down the houses; and the case of *Skinner* and the *East India* Company was cited in support of the objection. On the other side, they produced from a manuscript note a case before Lord Chief Justice *Eyre*, where he over-ruled the objection; and I over-ruled the objection upon this principle, namely, that the reparation here was personal, and for damages, and that otherwise there would be a failure of justice; for it was upon the coast of *Nova-Scotia*, where there were no regular courts of judicature: but if there had been, Captain *Gambier* might never go there again; and therefore the reason of locality in such an action in *England* did not hold. I quoted a case of an injury of that sort in the *East Indies*, where, even in a court of equity, Lord *Hardwicke* had directed satisfaction to be made in damages: that case before Lord *Hardwicke* was not much contested, but this case before me was fully and seriously argued, and a thousand pounds damages given against Captain *Gambier*. I do not quote this for the authority of my opinion, because that opinion is very likely to be erroneous, but I quote it for this reason; a thousand pounds damages, and the costs, were a considerable sum. As the captain had acted by the orders of Admiral *Boscawen*, the representatives of the admiral defended the cause, and paid the damages and costs recovered. The case was favourable; for what the
admiral

admiral did was certainly well intended ; and yet there was no motion for a new trial.

I recollect another cause that came on before me ; which was the case of Admiral *Palliser*. There the very gist of the action was local : it was for destroying fishing huts upon the *Labrador coast*. After the treaty of *Paris*, the *Canadians* early in the season erected huts for fishing ; and by that means got an advantage (by beginning earlier) of the fishermen who came from *England*. It was a nice question upon the right of the *Canadians*. However, the admiral, from general principles of policy, ordered these huts to be destroyed. The cause went on a great way. The defendant would have stopped it short at once, if he could have made such an objection, but it was not made. There are no local courts among the *Esquimaux Indians* upon that part of the *Labrador coast* ; and therefore whatever injury had been done there by any of the king's officers, would have been altogether without redress, if the objection of locality would have held. The consequence of that circumstance shews, that where the reason fails, even in actions which in *England* would be local actions, yet it does not hold as to places beyond the seas, within the king's dominions. Admiral *Palliser's* case went off upon a proposal of a reference, and ended by an award. But as to transitory actions, there is not a colour of doubt but that every action that is transitory may be laid in any county in *England*, though the matter arises beyond the seas ; and when it is absolutely necessary to lay the truth of the case in the declaration, there is a fiction of law to assist you, and you shall
not

not make use of the truth of the case against that fiction, but you may make use of it to every other purpose. I am clearly of opinion not only against the objections made, but that there does not appear a question upon which the objections could arise.

The three other Judges concurred.

Per Cur', Judgment affirmed.

I had some thoughts of shortening the Pleadings in this case, but after considering how much they contribute to the understanding of the arguments, I thought it adviseable to let them stand, as reported by Mr. Cooper.

IX. Of other Matters respecting new Trials, &c.

(3.) Of imperfect Verdicts.

M. 26. Car. 2.
B. R. 1 Sid. 234.

Verdict quod
locutus est ver-
ba, in an action
for words is
imperfect.

NOTA—*Twisden J.* said that it had been adjudged, where in an action for words the defendant pleaded not guilty, and the Jury found *quod locutus est verba*—that this verdict was imperfect, and the plaintiff could not have judgment.

Vide post Rex v. Woodfall.

Matthews v.
Hopkins, E. 17
Car. 2. B. R.
1 Sid. 244.

Action upon
the case against
a carrier, and
trover in the
same declara-
tion seem bad.

Dy. 35. b.
1 Vent. 365.
1 Keb. 870.

In an action upon the case, the plaintiff declared upon the custom of the realm, and that the defendant on the 10th of *May* was a common carrier, and the plaintiff the 6th of *May* was possessed of £. 50. and that afterwards, on the same day and year last-mentioned, he delivered it to the defendant to carry, and he neglected so to do, &c. And he also declared in trover for the same sum, and the defendant pleaded not guilty, and verdict for the plaintiff generally, and it was moved in arrest of judgment.

It seems that
the custom of
the realm ought
to be recited in
an action
against a car-
rier. *Qu.?*

2 Cro. 224.
242.

1st. Because he had not well recited and shewn the custom of the realm, and had not alledged that he was a carrier at the time of the delivery, but some days after :

And also that trover and an action upon the case may not be joined, because the one is

founded upon a *tort*, and the other upon custom.

But on the other part it was answered, that the declaration is good enough; for as to joining of trover and case, one plea goes to the whole, scil. *Not guilty*. And as to the mis-recital of the custom of the realm, it is part of the common law, and therefore the declaration is good enough without recital, and a bad recital does not vitiate in such case.

And there is a diversity between the recital of the common law, and of a statute; for if a general statute is mis-recited, this makes the declaration bad, because the law is formed in words in which there is not any variance, but if the action is founded upon the common law, and the custom is mis-recited, yet the declaration is good, because this is not written law, and formed in words, but the substance of it well known.

But *per Curiam* the declaration and verdict are bad, for although *not guilty* may go to both, yet the verdict ought not to be for the plaintiff generally, and although the declaration may be good without recital of the custom of the realm, as *Hob.* says, yet the better way is to recite it. *Vide Sid.* 181, 233, 244. *V. 2 Rol. Rep.* 140.

In *Mast versus Goodson*, M. 13. G. 3. C. B. 3 *Wils.* 348. Plaintiff declared for a tortious obstruction of an *easement* (which he held under an agreement from the defendant); and added a count in *trover*. The Court was of opinion the latter count might well be joined with the former, that being founded upon *tort*.

Diversity between the common law and statute as to recitals. *Plow.* 84.
1 Cro. 96, 162.
2 Cro. 224.
Hob. 310.
4 Co. 13. a.
10 Co. 57.

Not guilty may be a good issue where the verdict may not be general.
Hob. 249.
Vide the case of *Beringfage* and *Ralston*. M. 34.
Car. 2. B. R.
1 Cro. 20.

Rex. v. Wood-
fall. M. 11 Geo.
III. B. R.
3 Bur. 2661.
Tuesday 20th
November,
1770.

Information
for a libel—
Verdict, defend-
ant guilty of the
printing and
publishing,
only.

This cause first came before the Court on *Friday 22d June 1770.*

Mr. *Lee* then moved, on behalf of the defendant, to *stay the entering up judgment against him*, upon the verdict found in this cause.

A cross-motion was made at the same time, by the counsel for the Crown, for the defendant to shew cause why the verdict should not be entered according to the *legal import of the finding* of the Jury.

It was an information against the defendant, by the Attorney-General, for printing, and publishing in the Public Advertiser, a seditious libel signed *Junius*.

Upon the trial, the Jury found him *guilty of the printing and publishing, ONLY.*

The Court granted rules to shew cause, upon each of these two adverse motions; and ordered them both to be brought on upon the same day.

Accordingly, on *Tuesday 3d July 1770*, cause was reciprocally shewn on each.

Serjeant *Glynn* and Mr. *Lee* argued for the defendant: Mr. *Thurlow*, (Solicitor General) Mr. *Morton*, Mr. *Wallace*, Mr. *Dunning*, and Mr. *Walker*, for the Crown.

On the part of the defendant, it was insisted that the verdict, *as found*, did not amount to find Mr. *Woodfall* guilty of the charge in the information; but rather to acquit him of it. For, he is charged with printing and publishing this as a libel, with a *malicious and criminal intention*: But the Jury find him guilty of printing and publishing, *only*. Whatever the Jury do not find implies a negative: but this goes further; it says expressly, that they find this and this *only*.

A criminal

A *criminal motive* goes to the construction of the offence: a *criminal intention* is its *essence*. And this the Jury have negatived.

They are *judges of law and fact*, as far as law is involved in fact. They *may* take this upon them: and here they *have* done so. They meant to acquit him of all criminal intention: and one of the jurymen has made an affidavit, "That he meant to acquit him of all criminal construction: and if he had thought that that could not have been thus done, he would have acquitted him." Therefore this cannot be considered as a verdict of conviction by twelve jurymen. A verdict ought to be found clearly, fully, and distinctly: it cannot be supplied by inference; neither can it be amended by any notes of the associate, in a criminal case. 1 *Salk.* 53, *Rex v. Bold.* 1 *Salk.* 47, *Rex v. Keate.*

They also cited *Cro. Jac.* 210, *Cooke v. Laneday*; and *Yelverton* 106; and *Drury v. Dennis*; 2 *Rolle's Abridgment*, 693. Title, "Verdict," Letter, *S. pl.* 5. between *Baugh* and *Philips*, referred to by *Ld. Ch. J. Vaughan*, in the case of *Rowe v. Huntington*, *Vaughan*, 75, 76. Who there says, "That finding the point in issue, by *way of argument*, in a general verdict, is never permitted; not though the argument be necessary and conclusive." There can be no supply by intendment, in any case; much less in the present, where it is impossible to supply the verdict by intendment, because nobody can know what the Jury did intend, or by what rule, or upon what principle they decided; unless affidavits from the Jurymen were allowed to be read. Another authority that they cited, was the case of *Shelley v. Alsep*, in *Yelverton*, 77, 78,

which was a finding of the assumpsit by foreign implication; "which is not good," as it is there said, "upon any general issue:" and it is there laid down, "that the Jury ought to give their verdict precisely according to their charge."

They insisted, that the verdict ought to remain in the *words* of the Jury; without expunging any of their words, or substituting others in their places, or controlling them under any pretence of legal construction. They ought to be left as they stand; that the defendant may have the benefit of a writ of error to the House of Lords; if the opinion of this Court should be against him.

They hoped, however, that the present finding would be esteemed by the Court to amount to an *acquittal* of the defendant.

But, if the Court should not go so far as to hold it tantamount to an acquittal, there ought, at least, to be a *venire facias de novo*. It certainly is not a conviction: and if it be not an acquittal, it can be no more than an imperfect verdict. And if a verdict be *imperfect*, there must be a *venire facias de novo*. But we hope for his discharge, as upon a verdict of not guilty.

On the part of the prosecution, it was argued that the present verdict could not be considered as a verdict of not guilty. It positively and explicitly finds him *guilty* of the *printing and publishing*: and it does not import any negation of his guilt, as to the rest. The word "*only*" does not import the exclusion of any thing but *facts*: it cannot exclude *conclusion of law*.

It is certain that a verdict cannot be amended in matters of *fact*: but it may be perfected

perfected in point of *form*. The officer takes his note short : but the necessary finishing of the sentence may be supplied.

The substance and matter of this issue is sufficiently found : the Court may order it into a proper form. The *law* here implies the intention. The printing and publishing was all that the Jury were to inquire about. This verdict is not imperfect : nor is there any need of supplying any thing by *intendment*. The intention must be collected from the libel itself. The intention is the gift of the offence. The verdict ought to be entered according to the true meaning and intention of the Jury. *Something* is always to be added to *every* verdict : the entry is never in the very identical words used by the Jury ; which are always concise, and not full and formal enough to stand supported against a writ of error.

Whether a jury *may* or may not take upon themselves to judge of matters of law, they must at least do it at their peril. But here they have not done it at all : they have not determined, that this paper is *not* libellous.

So that whether they may at their peril do it, or whether they may not, they have not here risked that peril. The import of their verdict is a general finding of the *facts*, without expressing any sense of their own upon the *law*.

In the case of the *King* against *Beere*, reported in 12 *Mod.* 218. 2 *Salk.* 217. 1 *Lord Raym.* 414. *Cartbew*, 407. and *Holt*, 422. the Jury, as to the *writing* and *collecting* of the libels only, find him guilty, *prout in indictamento supponitur* : and as to all other things charged in the indictment, *præter scriptiorem*

et collectionem, they find him not guilty. The charge was for composing, making, writing, and collecting several scandalous, false, and seditious libels. The finding was—"quoad descriptionem et collectionem libellorum in indictmente mentionat' tantum, quod defendens est culpabilis; et quoad totum residuum in eodem indictmente content', quod defendens non est inde culpabilis." It was holden "that the bare writing and collecting the libellous matter was criminal," and "that the general finding shall be taken to be criminal;" and *Turton* and *Rokeby* cited some cases to prove, "that the writing of a libel, without publishing it, was punishable by indictment."

They also cited *Moore*, 194. *Dyer*, 362. *Hobart*, 54. *Moore*, 888. 2 *Lev.* 111. and, to prove that the word "only" might be rejected, 2 *Saunders*, 380. *Co. Litt.* 227.

Serjeant *Glynn* replied; enforcing the former argument, and denying that the case of *Beere*, or other cases now cited, were like the present case.

LORD MANSFIELD—It is much too late in this term, for any thing to be further done in this cause, with any effect. Let it stand over to next term.

Cur' advis'.

On this day (Tuesday 20th November 1770) his LORDSHIP delivered the opinion of the Court;

This comes before the Court upon two rules: The first (obtained by the defendant) "to stay the entering up judgment on the verdict in this cause;" the second (obtained by the Attorney General) "that the verdict may be entered"

"entered according to the legal import of the
"finding of the Jury."

The last rule must, from the nature of it, be first discussed; because the ground of argument upon the other cannot be settled, till this is disposed of.

Upon *this* rule, it is necessary to report the trial.

The prosecution is an information against the defendant, for *printing and publishing* a libel, in the Public Advertiser, signed "JUN-
NIUS:" The tenor of which is set out, with proper AVERMENTS as to the *meaning* of the libel, the *subject matter*, and the *persons*, concerning which and of whom it speaks; with INNUENDOS filling up all the blanks, and the USUAL EPITHETS.

In support of the prosecution, they proved, by *Nathaniel Crowder*, "that He bought the
"paper produced and twelve more, from *Col-
field*, the defendant's publisher, in the de-
"fendant's publishing room at the corner of
"Ivy Lane; that he goes often there; has
"occasionally seen the printing-room; and
"has had papers in the printing-room."

They read the paper produced: and the tenor agreed with the information.

George Harris, register of pamphlets and news-papers, proved "that the defendant, by
"himself and servants, paid the duty for ad-
"vertisements in the Public Advertiser. That
"the defendant had paid, himself; and all
"the payments were on his account: That
"the defendant has made the usual affidavit;
"and has been allowed the stamp duty for
"such papers as were unfold. That the du-
"ties for advertisements in the paper in ques-
"tion were paid by the defendant's servant; and

“ the receipt given on the defendant’s account.”

William Lee, clerk to *Sir John Fielding*, proved “ That he often carried advertisements for the *Public Advertiser*, to the defendant’s at the corner of *Ivy Lane*. That he generally paid ready money. That he has seen money paid to the defendant for advertisements ; and he had a receipt from the defendant, signed by him, the 29th of *November*, for £. 32, for printing advertisements in the *Public Advertiser*.”

On the part of the *defendant*, they called no witnesses.

His counsel objected to some of the *innuendos* : but they principally applied to the Jury, to acquit the defendant, from the paper being *INNOCENT*, or *not liable to the epithets* given it by the information ; or, that the defendant’s intent in publishing did *not deserve the epithets* in the information.

There was no doubt but that the evidence, if credited, amounted to proof of printing and publishing by the defendant.

There may be cases where the fact proved as a publication may be justified or excused as lawful or innocent. For, no fact which is *not criminal* in case the paper be a libel, can amount to a publication of which a defendant ought to be found guilty.

But no question of that kind arose in this cause.

Therefore I directed the Jury to consider “ Whether *All the “ innuendos” and all the applications to matter and persons made by the “ information*, were, in their judgment, the “ *TRUE MEANING of the paper.*” If they thought otherwise, they should acquit the defendant :

defendant: but if they *agreed with the information*, and *believed* the evidence as to the *publication*, they should find him *guilty*.

If the Jury were *obliged* to find whether the paper was a *libel*, or whether it was a libel to *such a degree* as to deserve the epithets given it by the information; or to *require proof of the express intent* of the defendant in printing and publishing, and of its being *malicious to such a degree* as to deserve the epithets given it by the information, *then* this direction was *wrong*.

In support of it, I told them (as I have, from indispensable duty, been obliged to tell every jury upon every trial of this kind) to the following effect.

That, "Whether the paper, meaning as *"alleged by the information, was in law a "LIBEL,"* was a *question of law*, upon the *face of the record*: for, after conviction, a defendant may move in arrest of judgment, if the paper is *not* a libel.

That all the *epithets in the information* were *formal inferences of law*, from the *printing and publishing*.

That *no proof of express malice* ever was required; and, in most cases, is impossible to be given.

That the verdict finds only what the *law infers* from the fact. Therefore, *after conviction*, a defendant may, by affidavit, lessen the *degree* of his guilt.

That where an act *in itself indifferent*, if done with a particular intent *becomes criminal*; *there the intent must be proved and found*: but where the act is in itself *unlawful*, (as in this case) the proof of justification or excuse lies on the *defendant*; and in failure thereof, the *law implies a criminal intent*.

The

The Jury staid out a great while, many hours. At last, they came to my house; (the objection "of its being *out of the county*" being cured by *consent*.) In answer to the usual question put by the officer, the Foreman gave their verdict in these words—"Guilty of the *printing and publishing, ONLY.*" Nothing more passed.

The officer has entered up the verdict *literally*; without so much as adding the usual words of reference, to connect the verdict with the matter to which it related. Upon this, the *two* rules I have stated were moved for.

Upon that obtained by the *Attorney General*, the *affidavit of a juror* was offered by the counsel for the defendant.

But We are all of opinion, "that it can *not* be received."

Where there is a doubt, upon the Judge's report, as to what passed at the time of bringing in the verdict; *there* the *affidavits* of jurors or by-standers *may* be received, upon a motion "for a *NEW* trial," or to rectify a mistake in the "minutes:" But an *affidavit of a juror* never can be read, as to what he then *thought* or *intended*.

This motion consists of *two* parts: First, "to fill up the *formal* words of reference;" the second, "to omit the word *only*."

We are all of opinion, "that the *first* is a *technical* omission of the clerk; and *ought to be set right*:" as to the *second*, "that the word *ONLY* *must* stand in the verdict."

There is *no* ground from any thing which passed, to explain the sense of the Jury so as that the officer might have entered a *general* verdict.

No argument can be urged for *omitting* the word

word "*only*," which does not prove "that it can have *no effect though inserted*."

And therefore it is a question of law, upon the face of the verdict.

THE DEFENDANT'S motion must be considered upon the ground of the word "*only*" STANDING. Was it *omitted*, there could be no doubt.

"Guilty of printing and publishing," where there is no other charge, is "GUILTY:" For, *nothing more* is to be found by the JURY.

In the case of the King and *Williams*, the Jury found the defendant guilty of printing and publishing the North Briton, "N^o 45." The clerk entered it up, "GUILTY." And no objection was ever made.

Where there are *more* charges than one, guilty of some, "*only*," is an *acquittal* as to the rest.

But in *this* information, there is *no* charge except for printing and publishing.

Clearly, there can be *no* judgment, of ACQUITTAL; because the fact found by the Jury is the *very crime* they were to try.

The *only* question is, Whether, by any possibility, the word "*only*" can "have a meaning which would *affect* or *contradict* the verdict."

"That the *law*, as to the subject matter of the verdict, is as I have stated," has been so often unanimously *agreed by the whole Court*, upon every report I have made of a trial for a libel, that it would be improper to make it a question *now*, in this place.

Among those that concurred, the Bar will recollect the *dead* and the *living not now here*.

And

And we all *again* declare our opinion, "that the direction is *right* and *according to* "law."

This direction, though often given with an express request from me, "that if there was "the least doubt, they would move the "Court," has never been complained of in Court. And yet, if it had been wrong, a new trial would be of course. It is not *now* complained of.

Taking then the law to be according to this direction, the question is, "Whether any "meaning can be put upon the word "only," "as it stands upon the record, which will *af-* "fect the verdict."

If they meant to say "they did not find it a "libel," or "did not find the *epithets*," or "did not find any *express* malicious intent;" it would *not* affect the verdict; because *none of these* things were to be proved, or found *either* way.

If, by "only," they meant to say, "that "they did *not* find the MEANING *put upon the* "paper by the information;" they should have ACQUITTED him.

If they had *expressed* this to be their meaning, the verdict would have been *inconsistent* and *repugnant*; for they ought *not* to find the defendant guilty, *unless* they find the *meaning put upon the paper by the information*: and judgment of *acquittal* ought to have been entered up.

If they had *expressed* their meaning in any of the *other* ways, the verdict would *not* have been affected; and *judgment* ought to be entered upon it.

It is impossible to say, with certainty, *What* the Jury really "*did mean*." Probably they had *different* meanings.

If

If they could possibly mean *that* which, if expressed, would *acquit* the defendant, he ought not to be concluded by this verdict.

It is possible, *some* of them might mean not to find the *whole* sense and explanation put upon the paper by the innuendos in the information.

If a doubt arises from an ambiguous and unusual word in the verdict, the Court ought to lean in favour of a *venire de novo*.

We are under the *less* difficulty; because, in favour of a *defendant*, though the verdict be *full*, the Court may grant a new trial.

And we are all of opinion, upon the whole of the case, "that there should be a *VENIRE DE NOVO*."

Mr. Attorney General said, the *original* paper was lost; or, at least, was never returned back.

LORD MANSFIELD. Nothing of that sort will vary the justice of the judgment.

IX. Of other Matters respecting new Trials, &c.

(4.) Of New Trials on the Ground of Irregularity, &c.

Vide ante VI. Leeman versus Allen, and others; et VII. Russell versus Ball.

Vicary v. Farthing, E. 38 Eliz. Mo. 451. n. 616. Delivering written evidence to the Jury by one of the solicitors, which evidence had been produced in court.

V. Mo. 452.

AT *nisi prius* the issue was upon *full age*, and two church-books were given in evidence; one of which was delivered to the Jury in court by consent of the parties, and the other was afterwards delivered to the Jury out of court, by the solicitor on one side, without the consent of the Court, and this was indorsed upon the *possea*. The question was, If the verdict should be void? And the Justices differed in opinion, *Popham* and *Gawdy* that it should not; *Fenner* and *Clench*, that in the case of *Landy* and *Metcalfe* in C. B. 33 Eliz. it was agreed to be good law, where the Jurors being consulting upon their verdict, and seeing out of the window one of the witnesses, they called to him, and desired that he would again declare to them what he had testified in Court, and he did, and nothing more; yet for this the verdict was adjudged void. But in the principal case, the book was delivered in evidence, and the other party had answered to it. Therefore *quare*? *Nota.* the books for avoiding a verdict, 14 H. 7. fo. 1, 2. *Doctor*

et

et Student, fo. 126. 4 *Ma. Bro. Verdict*, 477.

11 *H. 4*, 16. 35 *H. 6. Fitz. Examination*, 17.

If the defendant appears and makes defence, he shall never have a new trial, for want of due notice.

Thermolin v. Cole, H. 8. W. 3. B. R. 2 *Salk.* 646.

No new trial for want of notice after defence.

* *Southby v. Day and others*. H. 7. Geo. 2. *Barnes*, 154.

Just verdict for plaintiff, and moderate damages not set aside for small irregularity.

This * was an action of trespass for cutting down and carrying away twenty trees of plaintiff's. As to twelve of the trees, defendants justified for estovers; and as to the remaining eight, pleaded not guilty, and two separate issues were joined thereupon.

At the trial the merits were fully determined as to the issue joined upon the justification for estovers; but plaintiff gave no evidence upon the Not Guilty, and no notice being taken thereof, the Jury found a verdict for plaintiff generally, and gave five shillings damages, but omitted to acquit the defendants on the Not Guilty; whereupon defendants moved to set aside the verdict, and obtained a rule to shew cause, which was afterwards discharged on hearing counsel on both sides. The verdict appearing to be just, and the damages moderate, the Court would not overturn the verdict; but left plaintiff to enter up his judgment as he should be advised.

Baynes for defendants. *Chapple* for plaintiff.

The words (*and the said plaintiff likewise*) after issue tendered by defendant, were omitted in the issue delivered; but inserted in the record of *nisi prius*. *Burnett* moved to set aside the verdict, insisting upon this as a material variance, and had a rule to shew cause. But it appearing that *Mr. Lacy*, defendant's counsel, at the trial, had objected to the evidence given

Grave v. Cliffe. E. 12 Geo. 2. *Barnes* 445. Similarly omitted.

given by plaintiff in point of law, (which is making defence) though he did not cross examine, the rule was discharged. *Comyns* and *Draper* for plaintiff; *Eyre* and *Burnett* for defendant.

Thompson v. Simmons,
E. 6. Geo. 2.
Barnes, 475.
Variance between *nisi prius* record and issue.
Vide *Post Fitch* and *Nunn*.

Darnal moved to set aside the verdict, the record of *nisi prius* differing from the issue-book delivered, the defendant's name being inserted in the paper-book, in joining issue, instead of plaintiff's; but in the record plaintiff's name was inserted, and the issue properly joined; but two issues being joined, and a general verdict found for plaintiff, Court refused to make any rule.

Norman v. Beaumont, in
trespass and assault in Norfolk, M. 18. G. 2. *Barns*, 453.
A wrong jurymen sworn, verdict set aside.

Richard Geater, summoned and returned as a *nisi prius* juror, did not attend the Affizes; but one *Richard Sheppard*, a freeholder, who was verbally summoned to serve as a juror on the Crown side, and never had been at the Affizes before, did attend both courts (as he imagined himself in duty bound to do); when *Richard Geater* was called on the *nisi prius* side, *Richard Sheppard* (thinking himself called) answered, and was sworn as a juror.

Defendant insisted, that the verdict was null and void, the trial not having been by twelve but by eleven jurors only.

Neither party knew any thing of the mistake till after the trial. It was urged for plaintiff, that defendant ought to have challenged *Sheppard*; that after recording the verdict, no averment can be admitted against the record. That *Sheppard's* place of abode was different from that of *Geater*, which would have been good matter of challenge. And if defendant could aver against the record, yet the

the

the defect is cured by the statute 32 H. 8. c. 30. The verdict was for plaintiff, damages one shilling; and Lord Chief Justice *Lee*, who tried the cause, had certified, to entitle plaintiff to costs. *Per Cur'*. By the statute 3 Geo. 2. all the twelve jurors ought to be drawn out of the box; and the name of *Richard Sheppard* was never put into the box. The Court are not bound by the record. Here has been no trial. This is not matter of challenge; nor is the defect cured by the statute 32 H. 8. The rule on *Richard Sheppard* to shew cause why an attachment, was discharged. The rule to shew cause why the verdict should not be set aside, was made absolute. *Prime* for plaintiff; *Boote* for defendant; *Leeds* for *Richard Sheppard*.

This was an action for breaking and entering plaintiff's close, &c. Defendant justified in right of a way. Plaintiff replied *extra viam*; whereon issue was joined; and a special Jury and view applied for and granted. The name of *Henry Luppincott* of *Alverdiscott*, in *Com' Devon*, Esquire, was taken out of the freeholders book, and he stood as a jurymen; and was returned among the other jurors, in the pannel annexed to the writ of *Venire facias*; and was summoned, and did attend both on the view and at the trial. After a verdict for plaintiff on the merits of the cause; defendant moved to set aside the verdict; Mr. *Luppincott*'s christian name being *Harry* and not *Henry*; and produced an affidavit thereof from two persons: *Per Cur'*, this affidavit ought not to be received in a motion for a new trial. The record, and all the jury process, are uniform. Mr. *Luppincott* is the real person re-

Wrey v.
Thorn, M.
18 G. 2.
Barnes, 454.
Motion for
new trial, the
christian name
of one of the
jurors being
mistaken.

turned and intended to be a juror, and there is no pretence that the verdict is unjust. It is commonly understood that *Henry* and *Harry* are the same name; or that *Harry* is the same name as *Henry* corruptly spelt. The rule to shew cause why the verdict should not be set aside, was discharged. *Belfield* for plaintiff; *Hussey* for defendant.

Love and Appleton, v. Jarrett. E. 19 G. 2. Barnes, 457.

Paper-book received and paid for, but returned on discerning the replication to be bad, with notice of the mistake. Verdict obtained without defence set aside.

Defendant had time to plead by a judge's order, rejoining *gratis*. Plaintiff delivered a paper-book, containing a bad replication, and an issue joined by defendant. Defendant's agent's clerk received and paid for the paper-book; but his master perceiving the replication to be bad, returned the book to plaintiff's agent, and gave notice of the mistake, notwithstanding which plaintiff went on to trial, and had a verdict, without defence. Rule absolute to set aside the verdict, without costs. *Skinner* for plaintiff; *Draper* for defendant.

Hicks against Young. M. 20 G. 2. Barnes, 458.

Verdict for defendant in replevin (who brought down the record) set aside, the plaintiff not appearing.

In *replevin*, plaintiff did not appear at the assizes, defendant brought down the record, and his counsel insisting strongly on a verdict, Mr. Baron *Reynolds*, before whom the cause was tried, complied, and a verdict was found for defendant, though plaintiff did not appear. Upon application by plaintiff to set aside the verdict, the Court, after hearing the Judge's report, ordered the *postea* to be amended, and a nonsuit to be returned instead of a verdict for defendant; and that defendant should pay costs of the motion. *Prime* for plaintiff; *Draper* for defendant.

In

In *ejectment*; the *Venire facias* was awarded by mistake, returnable on the morrow of the *Ascension*, instead of eight days of the *Purification*. Defendants, though their witnesses attended the assizes, made no defence at the trial, but confessed lease, entry, and ouster, and suffered plaintiff to take a verdict, relying on the mistake in awarding the *venire*, returnable at a day subsequent to the assizes, 'till after which return, and default by jurors, there could be no *nisi prius*. The jury process was made returnable at the proper day: the Court held the variance material, on the authority of two cases cited by plaintiff's counsel, *Bastard & al. versus Bartlett*, T. 3 G. 2. *Dale versus Holmes*, M. 4 G. 2. in B. R. Verdict set aside on payment of costs. *Prime* for defendants; *Draper* and *Wynne* for plaintiff.

Woeden, on the demise of Long against Saunders, widow, and others. E. 23 G. 2. Barnes, 460.

Verdict set aside, the *venire* being returnable at a day after the assizes.

MOTION, *per Draper* for defendant, for a new trial, after verdict for plaintiff, in an action upon a penal statute (wherein no defence was made at the trial) founded on a variance between the issue delivered and the record of *nisi prius*, the words following, (*viz.*) *And thereupon the said plaintiff, by George Boldero, his attorney, saith, being omitted in the issue delivered, though put into the record. This was admitted not to be a material variance affecting the merits, and in civil actions helped by the statute of Jeofails, but not in an action on penal statute. In actions brought by original writ, the method is to recite the writ, and then to count; here is nothing but recital, without any count. By stat. 18 Eliz. a particular method is prescribed to the prosecutor; he must declare in person, or by attorney. Plaintiff, in this case, may,*

Fitch qui tam against Nunn. E. 26 G. 2. Barnes, 464.

Variance between the issue and *nisi prius* record.

Vide post IX. (11.) the same cause.

Vide ante Thompson v. Simmons.

possibly, be under twenty-one years of age, and, if so, cannot support this action, wherein he cannot declare by his *prochein amy*.

The Court, after hearing *Prime pro quer'*, did not incline to think the variance material, or to favour the distinction made *per Draper*. But as plaintiff's agent had made a blunder, and the merits had not been tried, ordered a new trial, and costs to attend the event. *Vide post IX. (11.)*

Griffiths v.
Williams,
E. 27 G. 3. B. R.
Durnford and
East, 1 V. 710.

Paying money into court, where the demand is for unliquidated damages, by a judge's order after plea pleaded, is irregular; but if the plaintiff take the money out, he thereby waives the irregularity, and cannot afterwards have a verdict, unless he recover more than the sum paid in.

The plaintiff is bound by the acts of his attorney's agent in town.

This was an action against the defendant as an attorney for negligence in not entering up judgment, on a warrant of attorney, against a creditor of the plaintiff, by which he had lost his security. The defendant pleaded the general issue, and afterwards obtained a judge's order for paying money into court. Notice was given to the defendant by the plaintiff's attorney, that the payment was irregular, and that he should not take the money out of court; but about ten days before the trial, the plaintiff's agent took the money out of court, and afterwards the plaintiff obtained a verdict for the exact sum paid into court.

On a former day, *Bower* obtained a rule to shew cause why the verdict which had been given for the plaintiff, should not be set aside, and a verdict entered for the defendant.

Douglas and *Milles* now shewed cause, and contended, that as this was an action in which unliquidated damages were claimed, the defendant could not pay money into court as of course. But even if it could, this was too late, it being after plea pleaded, 1 *Wils.* 157. *Barnes*, 279. And that irregularity is not cured by the plaintiff's agent taking the money out of court; for the plaintiff cannot be

be

be in a better situation by those means, than he would have been, if the defendant's attorney had paid the money into his hands. And even in that case, unless there had been a plea *puis darrein continuance*, the plaintiff must have obtained a verdict: for nothing can be taken advantage of under the general issue, but that which happens before plea pleaded. *Sullivan versus Montague*, Dougl. 101. *Reynolds versus Beerling*, Dougl. 108. n. 47. Beside the agent's taking the money out of court, ought not to conclude the plaintiff, after his attorney had expressly given notice to the defendant's attorney, that he would not take the money.

The counsel in support of the rule were stopped by the Court.

ASHURST, J. — This payment of money was originally irregular; for this is not one of those actions in which money could, strictly speaking, be paid into court; but that irregularity was waived by the plaintiff's taking it out of court.

He should have applied to discharge the rule as irregularly obtained; but instead of that, he received the money, which was paid into court, and went down to trial. It is no objection that the agent in town took the money out of court, because he acted as the plaintiff's attorney in town, and therefore the plaintiff is concluded by his acts.

BULLER, J. — Where the defendant is entitled to pay money into court, it is a matter of course before plea pleaded; and now, even after plea, it is perpetually done by obtaining a judge's order for that purpose. No inconvenience ensues to either party from this prac-

tice; because if any expence has been incurred, that is ordered to be paid at the time of obtaining the rule. And this tends to the furtherance of justice; for if the defendant pays into court what is really due, the plaintiff ought in justice to take it. That is the case in general. It is true, indeed, that the defendant in this action could not in strictness pay money into court, because it is founded in damages: but if the plaintiff had intended to object to it, he should have applied to discharge the rule. But he has acquiesced under this order by taking the money, and therefore is estopped from saying that the defendant could not pay money into court. It has been said, that this is to be considered in the same light as if the defendant had, after plea pleaded, actually paid so much money to the plaintiff as a satisfaction, in which case, unless there had been a plea *puis darrein continuance*, the plaintiff would have been entitled to a verdict. But this is extremely different from that case; for there the payment would be the act of the party, but this payment under a rule obtained, is the act of the Court, and therefore could not be pleaded *puis darrein continuance*. Then as to the agent's taking the money out of court, it is the same as if it had been done by the plaintiff himself. For where there is an agent in town, all notices are given to him, and are not sent into the country.

GROSE, J. — Here the objection, if good, is waived; for the plaintiff is estopped, by taking the money out of court, from taking advantage of any irregularity. There was time enough for the agent to have written into the country after he had taken the money out of court;

court; and after that, the plaintiff ought not to have proceeded to trial.

The *Court* made the rule absolute, directing that the plaintiff should have costs to the time of the money being paid into court, and that he should pay the defendant the subsequent costs (a).

(a) Durnf.
and East, 1 V.
629.

IX. Of other Matters respecting new Trials, &c.

(5.) Of granting a new Trial after two concurrent Verdicts.

Vide ante V. Tyndal and others, versus Brown, & VI. Clerk versus Udall.

Salk. 649. M.
2 An. B. R.
6 Mod. 22.

Improper to grant a new trial after second verdict on same side.

Goodwin v. Gibbons, T.
7 G. 3. B. R.
4 Burr. 2108.
Motion for new trial after two verdicts for plaintiff.

PER Holt, Ch. J. After second verdict on the same side, it is not fit to grant a new trial, because the Judge did not like the verdict; but if there were any practice in obtaining it, it is otherwise.

After two verdicts for the plaintiff, the defendant moved for another new trial. It was an action of trespass: and the trials had been in *Chester*.

The defendant was an attorney. At the first trial, the Jury found that HE had acted beyond his office and authority, or his duty as an attorney; and gave a verdict for the plaintiff: which verdict was set aside, and a new trial granted. The second verdict was also found for the plaintiff: which second verdict was now prayed to be set aside also; and a third new trial was prayed. A rule was made upon the plaintiff, to shew cause.

Upon shewing cause, Mr. *Morton's* report was read; and the question was much litigated: but it is not necessary to specify the particulars; because only the general doctrine

laid

laid down is meant to be here taken notice of.

Lord MANSFIELD.—There is no ground to say that a new trial shall not be granted, after a former new trial has been once granted before.

The general doctrine in such a case.

There is an index to a Report-book *, which mistakes a decisive *particular reason* in a particular case, for a *GENERAL rule*. See *Modern Cases*, Index, under the word "TRIAL."

* I suppose his lordship meant 6th Modern, where the index says—

"After a trial
"at bar, a new
"trial denied."

Sed. qu.

But there is no such general rule as has been supposed. A new trial must depend upon answering the ends of justice.

However, in the present case, he said, he did not see any reason for a new trial. He observed that here is no question of right, nor any great value: and upon the whole, he was clear that no new trial ought to be granted.

Mr. Justice YATES was clear, that a second new trial might be granted, as well as a first, if the reasons for granting it were sufficient.

But he also thought that in the present case there was *no* sufficient reason for granting one.

Mr. Justice ASTON.—The case of *Gwinne versus Poole et al'*, in 2 *Lutw.* 935, which cites *Olliet* and *Bessey's* case in *Sir T. Jones*, 214, does not contradict the position—

"That an attorney may exceed his authority and jurisdiction; and if he acts so with his knowledge, may be guilty as a trespasser."

And the case of *Moravia versus Sloper et al'*, in *C. B. Comyns* 574, recognizes the doctrine, "that in justifying under the process of an inferior court, it is necessary to shew it to be within the jurisdiction."

Upon the whole circumstances of this case, he concurred, that no new trial ought to be granted.

Mr.

Mr. Justice HEWITT.—If an attorney knows that the case is out of the jurisdiction of the inferior court, I think he will be answerable: especially, if he knows it clearly. Here, he did know it. And besides this, the Jury have found that He even *went beyond and out* of his duty as an attorney.

The granting a new trial a second time, must depend upon the circumstances of the case: it is very difficult to lay down any certain rule. Indeed, if two or three juries have determined upon the same point, and the same circumstances, it may be a matter of discretion, not to grant a new trial, but to leave the matter at rest.

Upon the circumstances of the present case, no new trial ought to be granted.

Per Cur' unanimously—

The RULE to shew cause why there should not be a new trial, was DISCHARGED.

IX. Of other Matters respecting new Trials, &c.

(6.) Of granting new Trials in Ejectment.

Vide note VIII. Wright ex demiss' Clymer versus Littler & al. et post IX. (16) Goodtitle versus Bailey.

IN *ejectment* after a trial at bar, Serjeant *Wright* moved for a new trial, because the verdict was *contrary to evidence*: the Court thought so too. *Rokeby* was for it, on the case in *Style*, *cæteri contra*; for *per Holt*, Ch. J. the reason of granting new trials upon verdicts against evidence at the assizes is, because they are subordinate trials appointed by *West. 2, c. 30. Ubi de paucis articulis & facilis est examinatio*. And there have been new trials anciently, as appears from this: that it is a good challenge to the juror, that he hath been a juror before in the same cause; but we must not make ourselves absolute judges of law and fact too; and there never was a new trial after a trial at bar in *ejectment*, but in case of ill practice, for the plaintiff may bring a new *ejectment*: upon this a new trial at bar was denied in *Sir Richard Temple's* case, where the Jury found a point of law on the statute of bankrupts against the opinion of the Court.

In

Argent v. Sir Marmaduke Darell, H.

11 W. 3. B. R. 2 Salk. 648.

New trial after trial at bar, refused in *ejectment*, because not conclusive. *Sed. vide post, Smith and Parkhurst.*

Baker, on the demise of Brown, versus Petcher. M. 8 G. 2. Barnes, 440.

Verdict for defendant upon a counterfeited deed, set aside.

In ejectment. Upon the trial a verdict passed for defendant, but a new trial was granted, the mortgage deed under which defendant claimed, appearing to be a counterfeit by the stamp, the dye which impressed it not being made 'till several years after the date of the deed. Where matter of title is the dispute, and defendant obtains a verdict, a new trial is always denied; but this is an extraordinary case where the revenue is concerned.

Brookes, on demise of Mence v. Baldwin. T. 18 Geo. 2. Barnes, 468.

Verdict good in part, bad in part, in ejectment.

In ejectment. Upon motion for a new trial, Mr. Baron Adams, before whom the cause was tried, reported to the Court, that the verdict (which was a general verdict for the plaintiff) was good in part and bad in part, agreeable to evidence as to lands in possession of one of defendant's tenants; contrary to evidence as to lands in possession of another tenant. 12 Mod. 271. 2 Salk. 648, 3 Salk. 362, were quoted to shew that where a verdict is good in part it must stand. Rule, that plaintiff shall take possession of that part of the premises only as to which the Judge reported in favour of the verdict. *Martyn* for defendant, *Poole* for plaintiff.

Vide N° IV. Huddleston versus Brigstock and others.

Leighton v. Sir Edward Leighton. M. 1720. 1 P. Will. 671. Ca. 192. 2 Eq. Ca. Ab. 525. Pl. 4.

Increase of a trust-estate devised to be sold, or devised to J. S. if the will

The defendant, Sir Edward Leighton's father, mortgaged, and afterwards sold the manor of *Balsley*, in the county of *Montgomery* in *Wales*, to his brother the plaintiff, and upon his death the now Sir Edward Leighton set up an old intail created about two hundred years since, and got into possession. The plaintiff brought an ejectment, which was tried in *Wales*, and a verdict

verdict passed for the defendant upon producing an old inquisition finding the intail; but there was no deed produced creating this intail.

be disputed, after two trials in favour of the will, equity will grant a perpetual injunction.

The plaintiff at law brought his bill in this Court, setting forth that the writings were all in the defendant's hands, and praying that they might be produced, and that the defendant might not set up a title under any trust-term. Upon which Lord *Cowper* decreed, that the trial should be upon the *mere right* in an ejectment; and that no trust-term, mortgage, or lease, should be set up, but that the defendant should make title only under the intail.

Accordingly it was tried in *Shropshire*, where, before Mr. Baron *Price*, the now defendant Sir *Edward Leighton* had a verdict; but the Judge certifying against it, a new trial was granted to be at the bar of the *Exchequer*, which was had, and a verdict for the plaintiff: there was afterwards a trial likewise in the *King's Bench*, and a verdict again for the plaintiff. And now on the equity reserved, it was prayed that the plaintiff should have a perpetual injunction with costs.

Lord *Parker*.—The plaintiff has no reason to complain (as he does) of the inconvenience, that there is no end of trials in ejectment, for the two first were found against him; but it is true, the two trials at bar, which were by the direction of the Court, being for him, I do not see what this Court has been doing, unless it should now grant a perpetual injunction. If a trust-estate be devised to be sold, and on a bill brought against the trustees to sell, the heir contests the will; after two trials, the Court will grant a perpetual injunction. In the case
of

(a)
Preced. in Chan-
cery, 261.

So after several
trials in eject-
ment, and ver-
dicts in all, in
favour of the
will, equity on
a bill of peace
will grant a
perpetual in-
junction.

Equity will
the rather grant
a perpetual in-
junction where
it directs the
trial, or where
the cause against
which the ver-
dicts are found is
odious in its na-
ture.

of the *Earl of (a) Bath versus Sherwin*, the title was a mere legal one; where, after several ejectments and five verdicts for the *Earl of Bath*, he brought a bill of peace for a perpetual injunction. Lord Chancellor *Cowper* thought this too much for him to grant, but seemed to recommend it to the plaintiff as a cause proper for the House of Lords; and on an appeal, the Lords granted a perpetual injunction, which I take as a reversal of Lord *Cowper's* decree, and as a precedent in the highest court of what ought to be in this case. Consequently it is very improperly said, that only the House of Lords in such case should grant a perpetual injunction; for that house on appeal gives such a judgment as the Court below ought to have done. This Court, in directing trials, and ordering writings to be produced, has been doing nothing all this while; if it cannot grant a perpetual injunction, which really, after so many trials, seems to be for the benefit of both parties.

As to the objection, that in the case of the *Lord Bath versus Sherwin*, the Lords would not have granted a perpetual injunction, but from its being an odious cause, tending to bastardize a noble person after his death; I answer, it did not tend to bastardize the Duke of *Albermarle*, but to make him the legitimate son of Radford.

However, the principal case is such as not in its nature to be entitled to any favour; for the defendant *Sir Edward Lighton* is contending against a purchase, under which there has been possession for very many years; against a sale made by his own father to his brother; and is setting up an old intail of about two hundred years standing to defeat this purchase; and

if there was not the clearest proof imaginable of such an intail, (as possibly there was not) the Jury were in the right not to find it. It is certainly an inconvenience in the law, that there should be no end of trials in ejectment; and that one trial in a real action (which perhaps may be a trial by *nisi prius*) should be final, when at the same time twenty trials in ejectment and at the bar in *Westminster Hall* will not be conclusive; but this cannot properly be urged in the present case, when upon the two or three first ejectments the verdicts went against the now plaintiff, who, had they been conclusive, must have been barred.

But as to the costs in this Court, the plaintiff *William Leighton* has had relief by producing the writings, and preventing the defendant from setting up any old terms; and it does not appear that the defendant *Sir Edward Leighton* (the heir of an ancient family) has so far misbehaved, as that he ought to pay costs; though he shall lose his own costs, the right appearing against him; but the plaintiff to have the costs at law for all the trials.

This decree was affirmed (a) in the House of Lords with £. 40 costs.

(a)
March 1720.

Upon a trial at bar in *ejectment*, the parties agreed to a special verdict as to a point of law arising upon a family settlement. But there being a question of fact in which they did not agree, that was left to the Jury, who found it for the plaintiff against the weight of the evidence.

The defendant moved for a new trial, and three objections were made. 1. That it was after a trial at bar. 2. That it was in the case of a special verdict. And, 3. That it was in ejectment.

Smith ex demiss' Dormer v. Parkhurst et al. Hil. Term. 12 G. 2. B. R. 2 Stra. 1105.
New trials may be had in ejectment, and after a trial at bar.

ejectment. These points were solemnly argued at the bar, and the Court took time to consider of them.

And as to the first, the Court held; that in the case of a verdict against evidence, its being a trial at bar was no objection to a new trial; which had been granted in the case of *Bewdley*; and in the case of *Sir Christopher Musgrave v. Nevinson*. *Pas.* 10 *Geo.* 1. 1 *Stra.* 584.

As to the second objection, they gave no opinion, it not being necessary to determine it upon the rule they intended to pronounce in this case.

Sir T. J. 124.
Carth. 507. et
ante Argent
v. Sir M. Darell.

As to the third objection, they strongly inclined, that the verdict not being final in ejectment, a new trial ought not to be granted; but upon very particular circumstances, where justice is no otherwise to be attained. And they observed, that no case had been cited of a new trial in ejectment after a trial at bar.

But the point upon which the new trial in this case was denied was, because they said the evidence was doubtful, and in such a case a verdict at bar ought to stand.

Goodtitle, on
the demise of
Alexander and
others, versus
Clayton and
others.

E. 8 G. 3. B. R.

4 Barr. 224.

Contradictory
evidence in
ejectment, but
judge not dis-
satisfied with
the verdict, as
there was evi-
dence on both
sides.

Sir *Fletcher Norton*, on behalf of the plaintiff, shewed cause against granting a new trial, in an *ejectment*-cause, wherein a special jury had given a verdict for the plaintiff, the heir at law of the testator; and the defendants had moved to set it aside.

The QUESTION was on the execution of a will. The testator's name was *Weston*.

Mr. Justice *Willes* read the report of Mr. Baron *Smythe* who tried the cause; which was very particular and circumstantial; importing, in general, that the evidence was contradictory; but

but that he could not declare himself to be dissatisfied with the verdict, as there was evidence on both sides.

LORD MANSFIELD thought it a very strong case for a new trial. He said, its being an *ejectment*-case is no reason at all against granting a new trial: for, though a new ejectment may be brought, yet here will be a change of possession; by which the defendant will be a sufferer. This objection against granting a new trial, "because a new ejectment may be brought," has been over-ruled again and again. An attesting witness to a will has here come to swear against her own attestation. Upon the whole of the evidence reported, it is a clear case for re-consideration.

MR. JUSTICE YATES—New trials are often granted in ejectment-cases as well as in others; where the party praying a new trial would suffer by a change of possession.

In the present case, I think, the witnesses ought not to have been admitted to give evidence against their own attestation.

There are cases where *one* witness has supported a will, by swearing that the other two attested, though those other two have denied it.

MR. JUSTICE ASTON was of the same opinion.—Every one of these witnesses has acknowledged their having attested this will. I think clearly that it requires a re-consideration.

MR. JUSTICE WILLES concurred; and thought the weight of the evidence appeared to be on the side of the defendants.

LORD MANSFIELD.—I have several cases, both upon bonds and wills, where the attestation of witnesses has been supported by the

evidence of the other witnesses, against that or the attesting witnesses who denied their own attestation.

It is of terrible consequence, that witnesses to wills should be tampered with, to deny their own attestation.

Therefore—Let the rule be made absolute, for setting aside this verdict; and a new trial be had: but it must be upon payment of costs.

Rule accordingly.

The Witnesses on both sides shd. go out of Court - After Att had examined two Witnesses, Henrich a 3^d Witness, & the most material was called. The Defts Counsel objected to his being examined - Att therefore submitted to a Non-suit

Shoephord began to show cause against Morgan's Rule - But Honyon Ch. J. said it would be hard to bar the Att of her right. Rule absolute for New Trial on payment of costs.

*Mitchell, books Count IX.
Curry J. Atty for Defor of Att*

IX. Of other Matters respecting new Trials, &c.

(7.) Of the Misconduct of Witnesses.

Vide ante III. The Queen v. the Bailiffs and Burgeffes of Bewdley.

IN order to a new trial an affidavit was read, that one of the witnesses had declared that he had got a guinea to stifle the truth. Gould—An affidavit of him who had the guinea were something, but his saying is nothing. A witness's laying a wager in the cause, is no hindrance to his being a witness, for the other has an interest in his evidence, which he cannot deprive him of.

George v.
Pevice, T.
1 Ann. B. R.
7 Mod. 31.

I cannot find this case elsewhere reported, nor any other case upon the subject.

I should not have made a separate head of this one case, if I could, with propriety, have inserted it under any other.—Upon the whole, I thought it better thus to insert it, than omit the case.

*Do ex dem Good v. bax, A Witness
E.T. 30 Geo. 3 B.R. Morgan staying in
moved to set aside Non-suit, & Court who
for New Trial at the last Lent ought to have
absizes, for surry, before Gould IX. been out, during
Justice. It was agreed the # of other witnesses
opposite*

IX. Of other Matters respecting new Trials, &c.

(8.) *New Trial not granted for want of Evidence which might have been originally produced.*

Vide ante IV. Letgoe v. Dun, Wheeler v. Pitt.

Anonymous.
M. 8 W. 3. C. B.
1 Salk. 645.
S. C. 1 Salk. 273.
2 Salk. 222.
New trial for
the absence of
counsel or evi-
dence. Q.
Vide 6 Mod.
22. 222. 242.
Farell. 156.
Vide post.

A NEW trial was granted because the counsel were absent, not thinking the cause would come on, and no defence was made; but a like motion was denied in *B. R. per Holt, C. J.* Also in one *Coppin's* case, a cause came on at seven in the morning, and an old witness could not rise to be there time enough; but it was denied, unless he would make affidavit of what he knew, and would answer so that the Court might judge of it, and how it was material.

Pitts, al. Witsv.
Polehampton,
Mich. 10 Will.
3. B. R.
Salk. 647.

New trial for
omission of the
party refused.

It was moved for a new trial, because the defendant having pleaded a composition, had forgot to carry down witnesses to prove the subscribers hands; and the motion was denied, because the debt was honest. And *Holt, C. J.* remembered where debt on a bond was brought against an heir, who pleaded *riens per descent*, but the verdict went against him, by omitting to bring the settlement to the trial; and the

Court

Court being moved, refused to grant a new trial, because it was an honest debt.

An inquiry found four voluntary escapes, for which *Ford*, warden of the Fleet, forfeited his office: issues hereupon were tried in B. R. at the bar.

Ford v. Tilly,
Pasch. 5 Ann.
B. R. Salk. 653.
S. C. Farrell.
156, 157.

New trial not granted for defect of preparation. See 6 Mod. 22, 222, 242. Vide ante.

One escape was proved by a witness, who was asked if he was never burnt in the hand for stealing a tankard; he answered, No. A new trial was moved for upon producing the record of the conviction, and the Court denied the motion, 1st, Because it was a trial at bar. 2dly, It is no reason for a new trial, that you, for the defendant, came not prepared; and the Chief Justice said *Soam's* case was a hard case. Vide 3. *Keble*. 365, 369. 2 *Lev.* 114. et *Pasch.* 4 Ann. B. R. between *Cockcroft* and *Smith*. That the party's evidence was not ready, was held no reason for a new trial, though at *nisi prius*: and a new trial was denied.

2 Salk. 642.

Per Cur', a new trial ought not to be granted for want of evidence, which the party might have had at the trial, and had not; but if it be proved that endeavours have been used, but prevented by some unforeseen accident, as sickness of the witness, &c. it may be good cause of new trial.

Warren v. Fuzz. Mic. T. 2 Annæ B. R. 6 Mod. 22.

Cause of a new trial for want of evidence.

Per Cur', a new trial is never granted for want of evidence whereof the party was apprised, and which he might have had at the trial.

M. 3 Annæ, in B. R. 6 Mod. 222.

New trial not granted for want of evidence, of which the party was apprised and might have had

At Guildball coram Raymond, C. J.

Price v.
Brown, Hil.
12 Geo. 1 Stra.
691. Evidence.

Upon payment after the day, and before bringing the action, it was pleaded to be a payment of the principal and all interest then due: on evidence it appeared a gross sum was paid, which upon computation did not amount to the full interest, but it was sworn that the plaintiff accepted it in full. I objected that they ought to prove it as they had pleaded; but the Chief Justice thought it well enough, upon which there was a verdict. And the next term I moved on affidavits of the falsity of the defence, and that we did not expect any defence, and therefore were not ready to contradict the single witness, who swore to the payment of the money. But the Court would grant no new trial, saying it would be of dangerous consequence, to suffer people to be setting up new evidence, after they knew what was sworn before.

No new trial where party might have had evidence on first trial.

Richards v.
Symes, June 26,
1742. 2 Atk.
319.

Of granting a new trial upon a suggestion that the party was not apprised of a particular evidence, and therefore not prepared to give an answer.

The question was, Whether there are grounds enough for a new trial?

The fact to be tried in the cause was, Whether Mr. *George Richards* gave the mortgage in question to the defendant in equity.

Upon the trial, in order to discredit the evidence of one *Bere*, the most material witness for the defendant in equity, the plaintiff brought a person to swear, that this witness for the defendant was not in *England* at the time he swore to the fact.

Several affidavits were read, upon the motion, on behalf of the defendant in equity, to prove that *Bere* was actually in *England*, at the time he swore to the fact.

It

It was insisted therefore, by his counsel, that the credit of *Bere* being invalidated, as hath been mentioned, weighed greatly with the Jury, and was the principal reason that induced them to give the verdict for the plaintiff in equity.

It was insisted likewise, that the defendant in equity was not prepared to do any more than to support the general character of his witnesses, or otherwise could have given the same answer he is able to do now, if he had been aware of the objection.

LORD CHANCELLOR.—This is an application for a new trial, which comes before the Court after a considerable length of time, as the verdict was given in *November* last.

The ground for the new trial is, that the defendant in this Court was surprised with evidence he was not aware of, and so he was not prepared to answer it.

A great many objections have been made to this motion, both upon general and particular reasons.

The first objection, That this is an application for a new trial, after a verdict found by a special Jury upon a trial at bar.

I do agree, that formerly some countenance has been shewn to this objection, a distinction taken between trials at bar, and at *nisi prius*, because the latter are subordinate to the other, and therefore not of so solemn a nature.

But this point was solemnly considered upon the case of the *Queen* and the Bailiffs and Burgeses of *Bewdley*, 1 *P. Will.* 207, where eleven judges against the single opinion of Mr. Justice *John Powell*, determined that a new trial ought to be granted.

Another general objection was, that it is

A distinction was taken formerly, between trials at bar, and at *nisi prius*; but in the case of the *Queen* and the Bailiffs and Burgeses of *Bewdley*, eleven Judges against one determined a new trial ought to be granted.

Vide ante III.

contrary to the rules in courts of common law.

For it was said, they never grant a new trial there for want of the attendance of witnesses, or of a party's not being ready.

The reason is plain, because the issue there is barely drawn out upon the fact which is to be tried, and it is impossible to tell, whether a jury found a verdict upon the merits, or upon a discrediting of witnesses; and courts at common law might set aside a verdict nine times in ten, if it should be a ground for a new trial, that one of the parties was not apprised of the evidence on the other side.

The intent of directing issues here, is only to inform the conscience of the Court, and therefore not tied down to the same strictness of verdicts as courts of common law.

A notice to the defendant before the trial, that the plaintiff will prove a person to be abroad, though it does not point out the particular place where, is sufficient for the defendant to be prepared to encounter this evidence.

Vide post, Essay IV.

But then it is said, and materially too, that there is a difference between issues at common law, and issues directed by this Court, because the intent of it here is only to inform the conscience of the Court, and therefore not tied down to the same strictness and regard for verdicts as courts of common law.

But in the present case, there are no grounds for a new trial, the person who makes an affidavit on behalf of the defendant in equity swears, that he gave *Richards* notice a fortnight before the trial, that they would on the other side attempt to prove *Bere* abroad, which though it was not so particular as to point out the very place where they would shew him to be, yet was sufficient notice for *Richards* to prepare to encounter this evidence.

The case of the *Attorney-General versus Montgomery* has been mentioned, in which I granted a new trial, but upon very different reasons from the present.

I was then aware of the inconvenience which might arise from granting new trials, upon

upon the discovery of new evidence relating to the same fact: but what I placed the chief weight upon was, that the evidence there was in the hands of the relators themselves, and there was no kind of danger of perjury, and therefore can be no precedent in the present case.

There is another reason that weighs with me, that the new trial is prayed on behalf of the plaintiff at law, and if it had been better made out, I should not have inclined to grant it, because it was in his power to have been nonsuited; for if his counsel had been of opinion that there was evidence that they were not apprised of, and too strong for them to encounter, they might have advised him to suffer a nonsuit, and then he might have come back to this Court for new directions, who would have ordered another issue at law notwithstanding the nonsuit.

If there is evidence a plaintiff is not apprised of, he may suffer a nonsuit, and on his coming back to this Court, I would have ordered another issue at law, notwithstanding the nonsuit.

Upon the whole, there are no grounds for a new trial, and of extreme dangerous consequence, to grant it merely upon a suggestion, that the party was not apprised of this evidence, and therefore was not prepared to give an answer.

A motion was made for a new trial: the question was as to the forgery of a certain paper, relative to the estate of Captain *Girlington*.

Stace v. Mabbot. July 26, 1754. 2 *Vezev* 552. Trial.

Against it, it was said, Justice *Foster*, who tried the issues, had certified, that he was satisfied with the verdict; and two cases were cited: the first, an action of *trover* brought among several other things for an ewer, wherein evidence was given, that those particular goods were delivered to one, who took them into

New trial upon new evidence, where the conscience of the Court was not satisfied, although the Judge certified in favour of the verdict, and where it would

not be granted in a court of law, which is stricter, and will not grant it to introduce new, or answers to, evidence.

into his custody, was answerable for, and did not deliver them. A motion was made for a new trial; for that looking into Mr. *Deard's* books it was found, there were two ewers: whereas upon the material evidence, on which the conversion was found, it was one ewer only: but that was denied, for the Court said, the parties might have introduced this evidence before. The other, *Walker v. Scot*, *B. R. Hil.* 1749-50; which was an action for criminal conversation, and a motion for a new trial on evidence, that the plaintiff was married to another, and therefore was not husband to the woman, and could not maintain his action; and that the evidence given was infamous: but this was denied, because it would be dangerous, if the Court was to permit the credit of evidence to be impeached by subsequent evidence, which was in the party's power before: and the fact of marriage might have been gone into before.

Lord CHANCELLOR.—If this had been an application for a new trial in a court of common law, in the ordinary course of proceedings there; I believe it is not such a case, that it would be granted; for they hold these motions for new trials by pretty strict rules. They have been a modern introduction; and by the discretion of the courts introduced, in order to avoid the difficulties of defeating verdicts by attain, in which it was difficult to prevail. But however, on motions for new trials at law the rule is, that if a verdict is given on evidence fairly, according to proper notice, and the Judge does not report, that he is dissatisfied with it, or that it was against evidence; the Court will not grant it, in order to introduce new evidence or new answers

New trials of modern introduction, and to avoid difficulties in attain. Granted here in case of inheritance or of value, or where the Court was not satisfied, particularly on forgery

answers to evidence; for the parties are supposed to come prepared to support the characters of the witnesses on either side, which is always presumed, and is right for courts of law to adhere to that: otherwise it would be endless. But this Court directs issues to be tried at law to inform the conscience of the Court as to facts doubtful before; and therefore expects in return such a verdict and on such a case, as shall satisfy the conscience of the Court to found a decree upon; if therefore upon any material and weighty reason, the verdict is not such as to satisfy the Court to found a decree upon, there are several cases, in which this Court has directed a new trial for further satisfaction, notwithstanding it would not be granted, if in a court of common law; because it is *diverso intuitu*, and because the Court proceeds on different grounds.

This is known to be the ordinary rule of this Court, where a matter of inheritance is in question; for the Court says, an inheritance is not to be bound by one verdict, if any sort of objection arises to the trial; and that notwithstanding the objection of inconvenience in examining over and over, which objection has not prevailed. This extends also to a personal demand, where of considerable value, and where the Court is not satisfied with the grounds, on which the determination was made at law, and when an objection is made and supported by proof; and particularly in a case of forgery new trials have been granted, and that by judges who have sat here, who have been as reluctant as any, and who inclined to adhere to the rules of common law. I remember a case in Lord *King's* time relating to a rent charge, granted out of the estate of

Mr.

Mr. *Hockmore*, in *Devonshire*. It had been twice or thrice tried at common law, tried upon distress taken on the rent charge, and an avowry, and where the question was singly whether it was a forgery or not, and upon all those trials verdict was found for the deed.

A bill was, notwithstanding, brought here to set it aside for forgery; and Lord *King* sent it to trial under an issue directed by the Court: and, I believe, there was a new trial after that; and notwithstanding all those verdicts, Lord *King* made a decree to have it brought into Court and cancelled here, the former trials not being to the satisfaction of the Court. Undoubtedly therefore it is in the discretion of the Court to grant new trials, if they think fit, if there is a ground for it upon the circumstances here; and the question is, Whether there is so or not? I own, I had very great suspicion, when it was on before me upon exceptions; however I did not think fit to determine it, but sent it to a Jury. The Judge has declared, he is well satisfied with the verdict; and if nothing appeared to me, but what appeared to him thereon, I think, I should have been of the same opinion with him. My opinion, therefore, in granting a new trial is grounded upon new evidence, which was not before the Jury there, and which is material. I cannot say, that my conscience is satisfied as to the grounds and truth of the evidence, upon which this verdict is given. I proceed therefore upon the principles of this Court in directing trials, and not to break in upon the rules which are wisely laid down by courts of law, as to granting new trials; and shall therefore direct another trial upon these issues: but it must be on payment of costs.

Assumpsit

Assumpsit upon a promissory note; defendant pleaded that the plaintiff accepted of some chests of tea in satisfaction, upon which issue was joined, and there was a verdict for the defendant; it was now moved on behalf of the plaintiff by Sir John *Strange* and Mr. *Crowle* for a new trial, upon an affidavit that the plaintiff took this to be a sham plea, and that he had a letter under the defendant's own hand, wherein it appears the defendant had disposed of the tea to another person, and wherein the defendant says he will pay the plaintiff his money due upon the note; which letter the plaintiff did not produce at the trial, thinking the plea was a sham, and that the defendant could not possibly prove it.

But *per Curiam*, new trials are never granted upon the motion of a party, where it appears he might have produced and given material evidence at the trial, if it had not been his own default, because it would tend to introduce perjury, and there would never be an end of causes if once a door was opened to this.

Suppose in a *scire facias* upon a judgment the defendant has a release, he is summoned, and has an opportunity of pleading it, and does not, he shall never have an *audita querela*; this is a very strong case at bar, for the plaintiff has notice of the defence of the defendant in his plea, and ought to have come prepared to falsify it at the trial.

And *Dennison, J.*— said he remembered a case of a horse plea, where the defendant pleaded he gave the plaintiff a horse in satisfaction. Plaintiff looked upon it as a horse (or sham) plea indeed, but the defendant at the trial proved it a true plea. Rule to shew cause why there

Cooke v. Berry.
T. 18 & 19
G. 2. B. R.
1 Wilson, 98.

New trial never granted for want of evidence which might have been produced at the trial.

In a *scire facias* on a judgment, the defendant hath a release and omits to plead it, he shall not have an *audita querela*.

Vide ante
Ford v. Tilly.
Et Warren &
Fuzz. Et ca.
following.

there should not be a new trial was discharged.

Norris v.
Freeman.
Mic. Term.
10 Geo. 3. C.B.
3 Willf. 38.

A new trial granted, altho' there was evidence on both sides, because all the witnesses subscribing to a release, were not called and examined, &c.

Debt upon a bond; defendant pleaded a general release; plaintiff replied *non est factum*, thereupon issue was joined; the cause was tried at the last assizes for the county of *Worcester*, before the Lord Chief Baron *Parker*, when a verdict was found for the defendant. Serjeant *Nares* moved for a new trial, upon an affidavit that very strong circumstances of forgery and perjury appeared upon the trial, whereupon the Court made a rule to shew cause. The Chief Baron reported, that at the trial the defendant produced a general release, supposed to be executed by the plaintiff the 10th of *October* 1768, to which *Albert* and *Goff* appeared to be subscribing witnesses. *Albert* was called, and swore that in *October* 1768, he was sent for, to go to the plaintiff's house to be a witness; that he went thither, and there saw the plaintiff seal and deliver the release produced in evidence, and also saw the defendant execute another general release to the plaintiff, (that the other subscribing witness was a poor labouring man, but he was not called to prove the release); that this was done about one o'clock that day, at the plaintiff's house, which is about thirty miles distant from *Worcester*. *John Webb*, a clergyman, and *Joseph Collins*, were called for the plaintiff, who swore they had often seen the plaintiff write, and that the plaintiff's name subscribed to the release, was not of his hand-writing, as they believed; and that on the 10th and 11th of *October*, the plaintiff and witnesses were at *Worcester* all day; it was the mayor's feast-day. Then *Thomas Homer* was called, (for plaintiff) who swore

swore he heard the defendant say, he would let judgment go by default in this cause, and file a bill in *Chancery* against the plaintiff for an account, and did not pretend he had any release from the plaintiff. It also appeared, that the declaration in this cause was of *Trinity* term 1768, and that the release was not pleaded until *Trinity* term last. In reply, the defendant called several witnesses, who swore they believed the name subscribed to the release produced, to be the plaintiff's handwriting; upon summing up the evidence, the *Chief Baron* acquainted the Jury, that he thought the strength of the evidence was with the plaintiff, but they found a verdict for the defendant.

Serjeant *Davy* for the defendant against a new trial, insisted, that there never was a new trial granted, singly, upon a Judge's reporting, that the strength of the evidence was on the side of the plaintiff or defendant; that in this case, there was evidence on both sides, of which the Jury are the only proper judges; and although it is sworn (by the witnesses for the plaintiff) that the plaintiff and the witnesses to the release were at *Worcester* on the 10th and 11th of *October* 1768, yet the witness *Albert* did not swear, that the release was executed on the day it bears date, it might be drawn and written on the 10th, and not executed till some days after; the *alibi*, only goes to falsify its being executed on the 10th; the *Chief Baron* hath not reported, that the verdict is contrary to evidence. Serjeant *Nares* was about to reply, when the Court, without hearing him, were of opinion, there ought to be a new trial.

There are cases where the Court will grant a new trial, although there was evidence given on both sides.

Curia. There are many cases where the Court will grant new trials, notwithstanding there was evidence on both sides, as where all the light hath not been *let in* at the trial which might and ought to have been; we think the other subscribing witness *Goff* ought to have been called and examined to the execution of the release, and he not having been called, we think it would be hard the plaintiff should be bound by this verdict, especially as the release is not in the power of the plaintiff, and so he cannot prefer an indictment for forgery. The *Lord Chief Justice* said, he thought the evidence was very strong on the part of the plaintiff, and that if the cause had been tried before him, he would (under the circumstances appearing) have called out for *Goff* the other subscribing witness, and if he had not been produced, he should have thought it a very strong case for the plaintiff, and directed the Jury to have found a verdict for him. A new trial was granted; *absente Gould, Justice.*

Gift v. Mason and others,
26 G. 3. B. R.
Durnford and
East. 1. V. 84.

Where a policy does not appear on the face of it to be illegal, the Court will not grant a new trial, in order to let the defendant into proof that it was so; but he should have shewn it on the trial. How far trading with an enemy is illegal in a subject?

Qu.

Case for money had and received, to recover the *premiums* upon certain policies of insurance underwritten by the plaintiff. This was tried before *Lord Mansfield*, at the sittings after last *Michaelmas* term at *Guildhall*, when the following facts appeared. That the defendants were *West India* merchants, and had property in the islands captured by the *French* last war. That it was a common practice to supply these islands with provisions from *Ireland*, notwithstanding they were in the hands of an enemy; that the defendants, who acted as their own brokers, had for this purpose employed neutral vessels, and had caused them to be under-

written.

written by the plaintiff from different ports in the Continent to *Ireland*, thence to *Madeira* and *St. Thomas*; and to all of them was annexed the liberty of going to any of the captured islands.

It had been long doubted whether these policies were legal: but in the case of the *Bella Juditha* (a), whereon a similar policy was effected, the Court were of opinion that the assured could not recover.

The plaintiff, in consequence of the above decision, had refused to pay where there had been a loss.

The defendant's counsel at the trial contended, that as these *voyages* were illegal, and as both the parties were in *pari delicto*, the maxim of law *melior est conditio possidentis* ought to prevail: but Lord *Mansfield*, being of opinion, that these policies were not illegal on the face of them, directed a verdict for the plaintiff.

Bearcroft now moved for a new trial to let the defendants into evidence to prove, that this kind of trading was so notoriously illegal, that the plaintiff must have known it to be so; that the reason why this evidence was not offered at the trial, was founded on a presumption that the Jury of their own knowledge must have concluded, that the illegality of these contracts was known to the parties at the time of making them.

LORD MANSFIELD, C. J.—This, upon the face of it, is the case of a neutral vessel. It is no where laid down that policies on neutral property, though bound to an enemy's port, are void. And indeed I know no cases that prohibit even a subject trading with the enemy, except two; one of which is a short note in *Roll. Abr.* (b), where trading with *Scotland*,

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H

then

(a)
Dalmady v. Motteux. Mich.
25 G. 3.

N. B. In that case the court decided principally upon the ground of an embargo having been laid on provisions in Ireland.

(b)
2 *Roll. Abr.* 173.

then in a general state of enmity with this kingdom, was held to be illegal; and the other was a note (which is now burned) which was given me by Lord *Hardwicke*, of a reference in King *William's* time to all the Judges, whether it was a crime at the common law to carry corn to the enemy in time of war; who were of opinion that it was a misdemeanor.

By the maritime law, trading with an enemy, is cause of confiscation in a subject, provided he is taken in the act; but this does not extend to a neutral vessel.

ASHHURST, J.—The defendant makes this application to the Court in order to supply his own negligence, when it is evident he was not taken by surprise at the trial. If it does not appear on the face of the policy that it is void, it ought to have been shewn by evidence; but no such evidence was offered.

BULLER, J.—As to the illegality of the contract being within the knowledge of both parties, such a fact is not to be taken for granted: what passes between two parties can never be such a matter of notoriety as should be left to a jury to presume.

Rule refused.

IX. Of other Matters respecting new Trials, &c.

(9.) *Verdict wrong delivered by the Foreman amended.*

ON a motion (made the 18th instant) to *set aside a verdict*, as being given in by the foreman, CONTRARY to the opinion and intention of EIGHT of the Jury—It appeared that the defendant justified under a right of a way, over the plaintiff's ground, to *two* closes of the defendant's, *viz.* *Broadmoor* and *Three-Acres*: upon which, *two different issues* were joined; *viz.* one upon the right of a way to *Broadmoor*; the other, upon the right of a way to the *Three-Acres*. And, the foreman gave in the verdict as a *general* verdict for the defendant, upon *both* issues. But *eight* of the Jury made *affidavit* "That it was the MEANING and INTENTION of the WHOLE Jury to find the former issue for the defendant; and the LATTER for the PLAINTIFF: and that this mistake was discovered by them, *an hour afterwards*; but not till the JUDGE WAS GONE to his lodgings." And upon the Judge's report it appeared that, though there was indeed evidence on *both* sides, yet the *weight* of the evidence was (as it appeared to him) on the side of the plaintiff, as to this latter issue.

Coyan v. Ebdon, and another. T. 30 and 31 Geo. 2. 1 Burr. 383.

Thursday 23d June 1757.

Verdict delivered by the foreman, contrary to the opinion and intention of eight of the Jury. Eight of the Jury made affidavit that it was the intention of the whole of the Jury to find otherwise than the verdict delivered.

N. B. The foreman had declined making any affidavit; because, he said, he should make himself appear a fool, to the Court of King's Bench.

This matter was much litigated by the counsel on both sides. The counsel for the plaintiff mentioned the case of *Baker v. Miles*, in *C. B. in M. 4 Geo. 2. B. R. S. P.* where eleven of the jurymen swore "That the foreman had mistaken their verdict;" and it was thereupon set aside.

The Court were all clear that this was a *mistake*, arising from the Jury's being unacquainted with business of this nature; and from the Associate's omission in not asking the Jury particularly "how they found *each respective* issue," and in not making the Jury fully *understand* their own finding; and that it was agreeable to right and justice, that the *mistake should be* RECTIFIED.

And they had no doubt about the *fact* of this mistake; from the affidavit of the eight jurymen, *confirmed* (as they held it in effect to be) by the foreman's declining to make any affidavit at all; especially, as the Judge's notes shewed the weight of the *evidence* to have been for the plaintiff, as to this latter issue.

And Lord MANSFIELD and Mr. Justice DENISON thought that as it was a *mere slip*, there might be *some* method of RECTIFYING the *verdict* according to the truth of the case; from the Judge's notes, if they were sufficiently particular; WITHOUT *sending* the issue to be tried over again, at a great expence.

Vide post IX.
(10.)

And the case of *Newcombe v. Green*, in 2 *Strange* 1197, was mentioned; where the *postea* was amended by the Judge's notes. And Lord Mansfield said, that at least they could

set

set aside the verdict *without* costs. But difficulties occurring how the costs would be, in such a case; as *one* issue was still found for, and was in truth clearly for the defendant. Therefore *Cur advis'*.

And now Lord MANSFIELD, seeing Mr. *Morton* in Court, who was concerned for the plaintiff, and had (on his behalf) moved to SET ASIDE the verdict, took occasion to mention this case; and said they had thought of it, and he had talked with his brother *Wilmot* * too, about it: but however, he was not now going to give any opinion; but only to *propose* what seemed to him the most proper method of coming at it.

* [Whose ordinary engagements were now in the other court.]

The case of *Newcombe v. Green*, itself, is not applicable to this case: but there is another case, of *Mayo v. Archer*, in 1 *Strange* 514, 515, where the question was, "Whether a farmer who bought and sold potatoes could be a bankrupt:" and the special verdict did not set forth the *quantities* he had bought and sold; though they were *proved at the trial*. The Court did not there award a *Venire facias de novo*; but *amended* the special verdict, in that respect; which case is more applicable to the present case, than that which was cited: for here they ordered the special verdict to be amended: though the plaintiff's motion was only "that a *Venire facias de novo* might be awarded."

But another case has been mentioned to me, which is applicable to the *principle* of this case; though not like the particular fact. It is that of *Dayrell v. Bridge*, Tr. 22 G. 2. B. R. trespass for cutting down an oak-tree—the defendant pleaded several pleas; one of which was, "*Not guilty*." At the trial, a ge-

neral verdict was taken down, and so entered ; and the Court *rectified the verdict*, by expunging the finding on all but the " Not guilty :"

It appearing that nothing was in question (at the trial) but " whether the place where the tree stood, was parcel of the manor, or " not." In the case of *Newcomb v. Green*, several cases * were cited on the same subject : though the case *itself* is not the present case.

* None are mentioned by Strange, pa. 1197. But Cro. Car. 338. Eliot v. Skyppe. 1 Salk. 53. Bold's case, and a case of Fry v. Horder, in Ld. Raymond's time, were cited.

If the Court sets the matter right, they should proceed according to the *whole* truth of the case. The Judge who tried the cause agrees to the fact disclosed in the affidavit of the *eight* jurymen : whereas your *first* affidavit, on which the rule was made, was an affidavit of only *four* of them.

Therefore what I would propose is, that you should make your motion, and have a rule to shew cause, why, upon reading the affidavits of these *eight* jurymen, the verdict should not be AMENDED and SET RIGHT, according to the *truth of the finding*.

Note. — Such a motion was afterwards made ; and a rule to " shew cause " granted. But it never came before the Court any more : it plainly appearing that the Court, upon deliberation among themselves, had come to an opinion " that in this shape the verdict *might* " be set right."

IX. Of other Matters respecting new Trials, &c.

(10.) Of amending the *Postea*.

A Writ of error was brought to reverse a judgment given in the Common Pleas in an action of trespass, and the error assigned was, that in the *postea* there is no association to the justice of assize expressed, as ought to be. *Roll Chief Justice* answered, this is the fault of the clerk of the Assize; *therefore let him attend and shew cause why the postea shall not be amended.*

Poynes v. Francis, H. 1649. Banc. Sup. M. 24 Car. rot. 222. Sty. 191.
Error to reverse a judgment in trespass — No associate to the Judge.
Amendment.

This cause was tried at *nisi prius* before the Lord Chief Justice, and a verdict taken by mistake of the associate generally for the plaintiff against both defendants, instead of finding the defendant *Edward Jones* not guilty; as to the other defendant, verdict was found for the plaintiff, damages £. 200. Plaintiff moved that the return of the *postea*, as to *Jones*, might be amended, which was ordered on the Chief Justice's report, and hearing counsel on both sides. The return of the *postea* is the act of the Chief Justice, and must be made as it ought to be: it was urged by defendant's counsel, that the verdict as to the other defendant, was contrary to evidence; but be that so or not, the verdict being right in part,

Williams against Jones and another, E. 8 Geo. 2. Barnes 6.

A verdict taken generally by mistake against two defendants, when one of them should have been acquitted.

Vide post IX. cannot be set aside. *Darnall* and *Wright* for defendants; *Eyre* for plaintiff.

Hankey,
Knight, who as
well, &c. against
Smith. H. 15
Geo. 2. Barnes
449.

To amend the
postea, by re-
turning the ver-
dict on the third
instead of the
first count.

Rule to shew cause why the *postea* should not be amended, by returning the verdict on the *third* instead of the *first* count, according to the finding of the Jury, was made absolute, upon the report of Mr. Baron *Carter*, before whom the cause was tried. It was ordered, that the associate do amend the *postea* in Court; that defendant have four days after the amendment to move in arrest of judgment; and that plaintiff do pay defendant costs of this application. *Prime* for plaintiff; *Bootle* for defendant.

Newcombe v.
Green. M. 17 G.
2. 2 Stra. 1197.
Postea amend-
ed by the judge's
notes.

In covenant the breach was assigned in non-payment of £. 270 mortgage-money. And on the trial the Jury gave a verdict for £. 274. 11 s. damages: and Mr. Justice *Burnet* entered it so in his minutes, but the clerk of *nisi prius* had only marked 1 s. damages on the *distringas*.

The Court was now moved, to alter the indorsement, by making it agreeable to the Judge's notes. And Mr. Justice *Denison* having conferred with him, and reporting the matter to be as above stated, the Court ordered it to be amended accordingly.

Vide *Auger* and *Wilkins*, post IX. (19.)

Eddowes and
another against
Hopkins and
another, execu-
tors of Harris.
E. 20th G. 3.
B. R. Doug. 361.
Where there
is a general ver-

Assumpsit tried before Lord *Mansfield*, at *Guildhall*, at the sittings after last *Michaelmas* term. The declaration contained several counts; some upon promises made by the testator, others on other promises by the defendants themselves. To the first set of counts

plene

plenè administravit was pleaded, and the general issue to the others; and the Jury having found for the plaintiffs with £. 147 damages, a *general* verdict was entered by the officer.

At the trial, the only question was, Whether the plaintiffs were entitled to interest on the value of goods sold by them to the testator? They were wholesale linen drapers, and the testator an *American* merchant, and it appeared to have been the usage of the *American* trade, for merchants here to allow their *American* correspondents twelve months credit, and then to charge them five *per cent.* for interest, and for the tradesmen here, to allow the merchants fourteen months credit, and then to charge five *per cent.* This was hardly disputed by the defendants, and his Lordship held, that though, by the common law, book debts do not of course carry interest, it may be payable in consequence of the usage of particular branches of trade; or of a special agreement; or, in cases of long delay under vexatious and oppressive circumstances, if a jury in their discretion shall think fit to allow it. But none of the articles for which the testator was indebted to the plaintiffs had been delivered *fourteen months before his death*, so that no interest was owing when he died, and the defendants contended that the usage did not bind the executors. Lord *Mansfield*, however, and the Jury, thought otherwise.

In the last term, the *Solicitor-General* obtained a rule to shew cause why the judgment should not be arrested, on the ground that the verdict was general, and the counts inconsistent, and such as require different judgments to be entered, *viz.* judgment *de bonis testatoris* on those where the promises were laid to be by the

dict on a declaration consisting of different counts, some of which are inconsistent or bad in point of law, and evidence has only been given on the good or consistent counts, the verdict may be amended by the judge's notes.

the testator, and *de bonis propriis* on the others. — Some time afterwards, *Baldwin*, for the plaintiffs, obtained a cross rule for the defendants to shew cause why the *postea* should not be amended by the judge's minutes, and a verdict entered for the plaintiffs, only on the counts to which the evidence given at the trial applied, and for the defendants on the others. — Both these rules came on to be argued this day.

The *Solicitor-General*, for the defendants, insisted, that, if the Court were to alter the *postea*, they would, in fact, do what was properly and exclusively the province of the Jury, for that the verdict would then be the act of the Court.

Lee, for the plaintiffs, contended, that this was not a new sort of application, and cited a case of *Newcombe v. Green*, in *Strange*, where it appeared by the judge's minutes that the jury had found for the plaintiff with £. 274. 11 s. damages, but the officer only entered a verdict with 1 s. damages, and the court directed an amendment to be made according to the judge's minutes (a.)

Lord MANSFIELD* said it was impossible to believe there was such an absurdity in the law, as that a mere mistake of the officer should be without a remedy, and that neither the judge nor jury could possibly have proceeded on what there was no evidence of before them; and he mentioned a case of one *Gibson*, who had been tried for robbing Mr. *Francis*, and convicted, and a mistake being discovered in the verdict, upon consultation with all the judges at his chambers, it was corrected from minutes signed by the jury, and the prisoner executed.

BULLER,

V. ante.

(a)

Vide Mayo v. Archer. B. R. E. 8 Geo. 1. 1 Str. 513, 515, where a venire de novo was moved for, on an affidavit that certain facts which the court thought material, but which were not found, in the special verdict, were proved at the trial; but the court directed the verdict to be amended in that respect.

* Vide also Bois v. Bois. B. R. T. 16 Car. 2. 1 Lev. 134.

BULLER, *Justice*, said there was this distinction, that if there was only evidence at the trial upon such of the counts as were good and consistent, a general verdict might be altered from the notes of the judge, and entered only on those counts, but that if there was *any* evidence which applied to the other bad or inconsistent counts (as for instance in an action for words, where some actionable words are laid, and some not actionable, and evidence given of both sets of words, and a general verdict) there the *postea* could not be amended, because it would be impossible for the judge to say, on which of the counts the jury had found the damages, or how they had apportioned them: that, in such a case, the only remedy is by awarding a VENIRE DE NOVO (b.)

He mentioned an instance where Sir *Fletcher Norton* had moved for and obtained a *Venire de novo* in a case of that sort (c.)

The rule to arrest the judgment was discharged, and the other rule made absolute; but on the payment of costs, including those of the motion, in arrest of judgment.

(b)
Vide *Auger v. Wilkins*.

Post IX. (19.)

Where this was done, and said to be according to an ancient rule of court.

(c)
Grant v. Astle.
T. 21. G. 3.
Vide IX. (19.)

IX. Of other Matters respecting new Trials, &c.

(11.) *Not granted in penal Actions, where the Verdict is for the Defendant.*

Seymour, Bart.
qui tam v. Day.
2 Stra. 899.

No new trial
in à qui tam, af-
ter verdict pro
def.

This on the
game law.

ACTION for a penalty in killing an hare,
not being qualified.

The Jury found for the defendant, contrary
to the direction of the Judge: but the Court
refused a new trial, saying it had never been
carried so far as a penal action.

Fitch who as
well, &c. against
Nunn, M. 27
G. 2. Barnes,
466.

Verdict for
defendant a-
gainst evidence,
on the game
law—new trial
refused. Vide
ante IX. (4.)
Same cause.

This was an action brought on one of the
penal statutes made to preserve the game,
wherein defendant obtained a verdict; plain-
tiff moved for a new trial, and the Judge be-
fore whom the cause was tried, reported the
verdict to be contrary to evidence. Notwith-
standing which, the rule to shew cause why a
new trial should not be had, on payment of
costs, was discharged; because no instance
could be shewn wherein an action on a penal
statute, in which a verdict was found for de-
fendant, a new trial had ever been granted.
Willis and *Agar* for plaintiff; *Wynne* for de-
fendant.

Mattison qui
tam v. Allan-
son. M. 19 G. 2.
2 Stra. 1238.

An action was brought upon the late sta-
tute against horse-racing for the penalty; and
the Jury found a verdict for the defendant,

contrary to plain evidence; and the Court denied a new trial, there being no proof of any misbehaviour in the defendant, or tampering with the Jury. And this was within the reason of cases in the Exchequer where verdicts for defendants are never set aside for penalties in the case of duties; and this is excepted out of the statute of Jeofails, as much as indictments.

New trial where not grantable.

Verdict for defendant against evidence, on the statute against horse-racing, refused to be set aside.

L. Raym. 63.
2 Keb. 226.
V. post.

Qui tam upon the game act for killing a hare, verdict for defendant; motion for a new trial, because the Judge who tried the cause refused to admit a person to be a witness, who was a parishioner of the same parish where the hare was killed; but *C. J. Lee* said, he did not remember that ever a new trial had been granted in the case of a penal action; and so *per Cur'*, the motion was refused.

Jervois qui tam. v. Hall. E. 16 Geo. 2. B. R. 1 Wils. 17.

No new trial in a penal action, videlicet, on the game act.

In an action upon the statute against bribery, there was a verdict for the defendant; and now Serjeant *Forster* moved for a new trial, as being against evidence. But *per totam Curiam*, we never grant new trials in actions on penal laws; and it has been so held for more than fifty years past.

Fonereau v. E. 10 Geo. 3. C. B. 3 Wils. 59.

A new trial is never granted in actions upon penal laws, where verdict for defendant. This on the statute against bribery.

The Court condemned the case in 2 *Keb.* 226.

IX. Of other Matters respecting new Trials, &c.

(12.) Of new Trials in criminal Prosecutions.

(a.) In the nature of Civil Proceedings.

(b.) In actual Criminal Prosecutions.

(a.) In the nature of Civil Proceedings.

Vide XII. The King v. Roger Philips, Mayor of Caermarthen.

Rex v. Lord Fitzwater. T. 27 Car. 2. B. R. 2 Lev. 139.

If Jeofails in informations, &c. are cured by verdict, or not. This an information in the nature of a quo warranto for fishing in the river Thames.

INFORMATION in the nature of a *quo warranto* for fishing in the river Thames, in a place extending to B. in seven parishes, as appears upon the record. After verdict for the defendant, it was moved in arrest of judgment by *Maynard*, that the *venire* was taken of one parish only, where it ought to have been of all, and that it was not cured by the statute of *Jeofails*, being an information which is excepted out of the statute. 1 Cro. Rex v. *Talbot*, and also in the new statute 16, 17 Car. 2. is the same exception of all *appeals*, *indictments*, *informations*, and *informations upon penal statutes*. To this it was answered that this is the fault of the prosecutor himself who sued out the *Venire facias*, ergo he ought not to take advantage of his own default. And the *proviso* excepts informations, &c. upon

penal laws only, which is not the case here. And as to the opinion in *Talbot's* case, they said, it seemed unreasonable, to hold that the king was not bound by the law, not being named, for it appears by the exception that the parliament understood that the king was bound though not named, otherwise there had not been any occasion for the exception. And if he had been bound, if the exception had not been in those cases, he should be bound in this case which is not excepted. *Twisden* and *Wild* held this case not cured by the statute. *Hale* *semb contra & adjournatur*. And afterwards in *Michaelmas* term the verdict was set aside upon *affidavits*, that the Jury cast lots for their verdict, and gave it according to lot; so the exception here was not determined.

The Jury cast lots for their verdict. This a ground to set it aside.

The question was, if upon a trial, a point in law be started by the judge, and the counsel do not take it up, but insist upon other facts, which are found against them; whereas had the counsel insisted upon the matter of law started by the Judge, the verdict must have passed for them, whether this is sufficient cause to move for a new trial?

Chief Justice PARKER.—The granting of new trials is of late original; it began about the year 1652, when the first new trial was granted for excessive damages. Experience shews, that they are grantable, as well for a fault in the judge, as jury, in causes tried at *nisi prius*, because a judge of *nisi prius* acts rather in a ministerial than judicial capacity; and the ground and foundation of granting new trials, when either the judge or jury are to blame is one and the same, *viz.* doing justice to the party.

Queen and Corporation of Helston in Coun' Cornwall. H. 12 Ann. B.R. Lucas, or 10 Mod. 202.

Motion for a new trial, a point of law started by the Judge, which the counsel did not take up.

When granting new trials began.

Vide post, and qu. de hoc?

When grantable. Salk. 649.

The

The question in this case, I take to be this : Whether we are so bound down by forms of law, as that though we see a verdict given contrary to a point of law (which the Judge himself took notice of, and yet for want of the counsel's doing their duty to their client, was not insisted upon) we cannot grant a new trial?

When a point of law arises, whether the counsel insist, or not insist upon it, the judge is bound to direct the jury accordingly.

But yet, if the supporting of this verdict, be of no more ill consequence, than in point of costs, and the party has another remedy left him, then I am of opinion, that the party ought to suffer for the neglect of his counsel.

But if the verdict binds and concludes the right of the party, then I think it hard, that the party should lose his right, by a mistake, or slip of the counsel.

Powys *senior*.—It would be a vast inconvenience, if the bare stirring of a point at *nisi prius*, and which for ought appears, neither judge, counsel, nor jury thought upon more, should be a ground for granting a new trial; for it may be, the reason why it was not insisted upon by the counsel was, because they knew the other side had evidence, that would give it a full answer, by quite altering the fact. What happens now accidentally, may hereafter happen designedly; matter may be slipped in by the counsel, and then dropt, only in order to move for a new trial; and it is better to suffer a particular inconvenience, than open the way to a general mischief.

Eyre.—Mistake of judge or jury, a good cause of granting a new trial; but never yet heard, that the mistake of the counsel was so. The counsel stands in the place of his client; and

Mistake of a judge or jury a good cause for granting a new trial, but not the mistake of counsel.

and therefore if the counsel waive a point, it is the same as if the client did it himself.

POWYS Junior.—If a defendant in an action of debt upon a bond who has a good defence upon the merits, should, by advice of counsel, hazard his cause upon a demurrer, which is adjudged against him, this mistake of counsel would not be allowed in Chancery, as a good cause of relief*.

In debt upon bond, if the defendant, who has a good defence upon the merits, should hazard his cause upon a demurrer, he can have no relief afterwards.

PARKER, Chief Justice.—There must be no new trial. And I so far assent to my brothers, that though a verdict should leave the party remediless, yet if the counsel does not only, not insist, but expressly waive an objection, &c. that then there ought to be no new trial.

Upon the trial of an information in the nature of a *quo warranto* for exercising the office of Mayor of *Shaftesbury*, the Jury found a verdict for the defendant; and upon a motion for a new trial, great doubts arose, whether after a verdict for the defendant, there could be any new trial, though the Judge should certify (as he did in this case) that it was a verdict against evidence.

The King v. Bennet. T. 4 Geo. 1. B. R. 1 Stra. 101. Court divided about a new trial, in an information in nature of a *quo warranto*, for exercising the office of Mayor of *Shaftesbury*.

After the point had been twice spoken to in *B. R.* it was adjourned *propter difficultatem* to be argued before all the Judges of *England*, who being this term assembled at *Serjeant's-Inn*, the following arguments were made.

DENTON.—New trials can only be granted by the superior courts, and not by any inferior ones. Trials at the assizes are subordinate

* At common law, in such cases, the courts frequently give leave to withdraw a demurrer, even after argument, and to plead, upon payment of costs.

* V. ante VI.
Wood & Gun-
ston, & Qu. If
this was the
first?

1 Will. Rep. 207.
Vide ante III.

trials, and under the inspection of the superior court out of which the record issues. In *Stiles* 466. which was the first * new trial that ever was granted, it was said by *Glynne*, that the court in these cases has a judicial, but not an arbitrary discretion. I must agree that generally no new trial shall be granted after a trial at bar, but yet in the *scire facias* against *Bewdley*, *Trin.* 11 *Annæ*, which was brought to the bar, and the Jury refused to find a special verdict, the Court ordered a new trial.

It is objected, that this is a criminal proceeding. But we say, that since 9 *Annæ*, c. 20, it has a mixture of civil. The relator is liable to costs, and the statutes of *Jeofailes* extend to it. And why should not this be considered in the same view as *Mandamus*'s, upon which new trials are granted frequently. The original writ of *quo warranto*, was merely civil. *Old. N. B.* 107. *Sid.* 54. 86. 2 *Inst.* 282. *Rastal*, 540. *Old Ent.* 133, 134. and upon that the franchise, which was a civil right, might be seised. Formerly, indeed, upon an information in the nature of a *quo warranto*, the party could only be punished for the usurpation. *Yel.* 190. *Cro. Jac.* 260. 1 *Bulst.* 54. *Co. Ent.* from 527 to 564. But now judgment of *ouster* may be pronounced.

These rights are of a high nature, and it would be a great inconvenience, to tie them up stricter than actions. Suppose the Jury should refuse to find a special verdict, or the Judge should mistake the law, will there not be a failure of justice, if a new trial cannot be had? *Mich.* 2 *Geo. Rex v. Inhabitantes de Walthamstow*, in an indictment for not repairing the highway, and *Regina v. Inhabitantes de*

is,

de com' Wilts, for suffering *Lacock Bridge* to be in decay, new trials were granted.

Pengelly, Serjeant.—This is a discretionary question, wherein no defect of power is to be supposed. The defendant cannot plead Not Guilty. 2 *Inst.* 282. 2 *Co.* 24. b. 28. b. *Hardr.* 423. *Cro. Jac.* 43.; but must disclaim, or shew his right.

It is the prerogative of the Crown, to determine civil rights by way of information. Thus the King brings his information of intrusion in the *Exchequer*, which is but a common ejectment. And so informations by way of *devenerunt*, which is in effect an action of trover; and in these cases new trials are every day granted. *Co. Ent.* 390. And in those cases there is a fine.

It will be no objection that the year is expired; for this prosecution was commenced within the year, and the judgment must be the same, because it is to avoid all mesne acts. *Co. Ent.* 527, 530. *Trin. 8 Ann. Regina v. Barber.* That was an information of this nature against the defendant, who claimed to be burghers of *Thetford*. There was judgment by default, and then came a pardon, which was held only to discharge the fine, but not the judgment of *ouster*. The fine here will be *salvo contentemento* according to *Magna Charta*, and the bill of rights. Since the statute this has all the incidents of a civil prosecution, the commencement only excepted. Before, the King only could have it, but now any private person may at peril of costs. If no new trial be granted, the Crown will be in a worse condition than the subject: for here the verdict will be final, and no new information can be had.

Earl, Serjeant, *contra*.—The only question is, Whether this be a criminal or a civil prosecution?

secution? For, on the one hand, if it be of a civil nature, I must agree a new trial may be granted: and on the other hand, it must be admitted, that if this be merely criminal no new trial can be had.

It is not denied, but that at common law this information was a criminal proceeding; whether the statute has altered the nature of it, is the doubt. We think it remains as it did before. The consequence of it is still fine and imprisonment, with this addition, that judgment of *ouster* may be given, which could not before; and because the statute has made it more penal than it was at common law, therefore, say they, it is now changed from a criminal to a civil nature. This is such an inference, as I cannot see into the reason of. But, say they, the statutes of Jeofails do not extend to criminal proceedings, but they extend to this; *ergo*, this is not a criminal proceeding. I desire to know, whether it will be pretended, that they would have extended to this case without the express provision of the statute? Certainly they would not. And the Parliament was aware of that, and therefore added that clause. The first * new trial is *Stiles* 448. and there the witness died of an apoplexy. *Lord Townsend v. Dr. Hughes in C. B. 2 Mod. 150†*. In *scandalum magnatum* a new trial was denied.

Cannot the King release, pardon, or stop this prosecution? Surely he may. In capital cases the defendant may plead *autre fois acquit*; so careful is our law, that the subject shall never be borne down by the weight of the Crown. 1 *Sid.* 405. 2 *Keb.* 403, 765. 1 *Lev.* 9. 1 *Keb.* 124. are cases where the defendant was convicted, and in *favorem libertatis* a new trial may

* *Qn.* ? Vide ante VI. Wood & Gunston, Sty. 466.

† Vide ante VI.

may be granted. *Mich. 3 W. & M. Rex v. Davis*, in an information for a riot, a new trial was denied. 1 Show. 336.

Mich. 7. W. 3. Smith v. Frampton, Salk. 644. in an action for negligently keeping his fire, wherein the defendant was acquitted, it was refused to be tried again. Indeed *Pas. 4 Jac. 2. Rex v. Simpson et al'*, information for seditious words, after acquittal a new trial was granted, but whoever observes the time that case happened, and that it was denied for law by *Holt* in *Davis's* case before cited, will think it of little weight. *Pas. 2 W. & M. Dr. Salmon's* case, the defendant was convicted of perjury, and had a new trial; but the Court said it would have been otherwise if he had been acquitted. *Pas. 5 Ann. Regina v. Clarke*, in an indictment for a nuisance, after acquittal the Court denied a new trial, 'till the defendant came in and consented. It was granted in Sir *Jacob Banks's* case, only because he had carried it down by proviso, which could not be against the Crown. Vide ante IV.
2 Salk. 652.

Mich. 3 Ann. Hartness v. Sir J. Barrington, after the defendant had been acquitted of an assault, a new trial was denied. So *Salk. 646.* after acquittal for a libel.

In this case the office is determined, so there can only be a fine and imprisonment. And if one new trial may be had, the same reason will hold for a second and a third, and nobody can say where it will stop. It may happen that the defendant may be convicted on a second trial, for want of that evidence which acquitted him before. The case of *Bewdley* was only a *scire facias*, which is a proceeding purely civil.

Yorke.—This question is of far greater consequence to the subject than the Crown. It consists of two parts :

1. Whether a new trial can be granted in any of those cases?

2. Whether there be any particular circumstances in this case, to distinguish it from the general ones, and so induce the Court to refuse it?

Vide post IX.
(12.) (b.)

First, When new trials first came in, they introduced a great alteration. The case of *Fenwick v. Holt* (which was an information, and not an indictment, as some of the books say) is full in point; and the Court said they could not do it without altering the law; which shews there is not a discretionary power. This is the rule in criminal cases, which I shall shew this to be. At common law, usurpations were a crime, a contempt to the King, and an oppression of the subject. A *quo warranto agit in rem*, an information in nature of a *quo warranto in personam*. The first charges a crime, and the other a *user* of the franchise. This is all of the Crown side, which the civil rights of the Crown are not, as *quare impedit*, which are of the plea side. The replication concludes, *petit quod convincatur*; and so is *Co. Ent. tit. quo warranto*; now *conviction* implies *crime*. This cannot be called an action, the prosecutor neither demands nor recovers any thing, *et actio nil aliud est quam jus prosequendi in judicio quod sibi debetur*.

When proceedings in *Eyre* dropt, then informations came in, which are of a higher nature than the proceedings in *Eyre*. 2 *Inst.* 282, 498.

The statute 9 *Ann.* takes notice of this as a criminal proceeding: as for the costs, they are collateral,

collateral, and cannot change the nature of it. The 4 & 5 W. & M. c. 18. gives costs in perjury, where prosecuted as a misdemeanor by information; and can any one say it is now become a civil prosecution? In the case of *Strode v. Palmer*, it was held, that *mandamus*'s would not come within the description of *actions*, so as error might lie in the Exchequer-Chamber.

Litt. Ent. 248.

The Jury may take the law upon them, if they will. *Litt.* §. 368. The relator here is only appointed for the security of the costs. In the case of *Ilchester* he died, and thereupon the defendant moved to stay the proceedings: No, says the Court, this is the cause of the Crown.

I omit his argument from the facts in this case.

Denton replied, The clause of jeofails was only thrown in, *in majorem cautelam*, as declaratory of the law.

Pengelly.—Sir T. Jones, 163. new trial after conviction of perjury.

Afterwards in *B. R. Pratt, Ch. J.* declared, that they had called in the assistance of the other Judges, and that upon the whole they were equally divided; so no rule for a new trial could be made. The division, as I was informed, was thus: For a new trial, in *B. R. Pratt* and *Eyre*; in *C. B. King* and *Tracey*; in *Scacc. Price* and *Montagu*. Against a new trial, in *B. R. Powys* and *Forrescue*; in *C. B. Blencowe* and *Dormer*; in *Scacc. Bury* and *Page*. *Vide post Essay III. the King and Francis.*

Upon an information of seizure of Jesuits bark on the stat. 14 Car. 2. cap. 11. sect. 12.

Robinson qui
tam v. Leque-
rne, Trin. Term.

1728, Bunbury
253.

Whether a new trial can be granted on an information of seisure, where a verdict is for the defendant.

for fraudulent exportation of Jesuits bark, two casks out of six being dust. There was a verdict for the defendant, and now a motion was made for a new trial; but, *per totam Curiam*, it was denied.

Nota, It seemed to be admitted in a case of this nature a new trial might be granted, if the fact would have admitted of it, and the counsel for the plaintiff were prepared with precedents (if they had been called for) to that purpose.

Nota, Nothing is forfeited on this clause of the act, but the goods themselves.

The King v. Bell, M. 8 G. 2
2 Stra. 995.

No new trial to be granted after four years acquiescence. This a quo warranto against a person acting as a common-council-man of Marlborough.

An information in nature of a *quo warranto* was brought against the defendant, to shew by what authority he claimed to be a common-council-man of *Marlborough*: and upon a trial in 1731, there was a verdict for the defendant.

This term the prosecutor moved for a new trial, as being a verdict against evidence; and the prosecutor referred to the report of the Judge, and insisted he was not too late, there being no judgment yet signed, according to the case of *Gilman v. Smith*, Mich. 9 Geo. 1. where it was held, that though the four day rule be out, yet it is sufficient if they come before judgment. 2 *Stra.* 845.

But the Court would not suffer the merits of the motion to be gone into, on account of the length of time since the verdict; it being possible that many men's rights might depend on the validity of this man's vote, which the corporation was bound to admit, after a verdict establishing his right. And it would be much less mischief, to let this verdict stand (supposing it to be wrong) than introduce a general inconvenience. They said, all new trials were

were discretionary: and though my Lord *Holt* entertained a notion of their being ancienter than the case in *Stiles*, from the challenge we meet with in the old books, that the juror had before given a verdict in the same cause; yet it does not thence follow, that the court granted a new trial upon the evidence; for it might appear to be a mis-trial upon the record, or there might be other reasons to award a *venire facias de novo*.

On a motion for a new trial, on an information in the nature of a *quo warranto* against defendant, to shew cause by what authority he acted as *Mayor of Liverpoole*, for that the verdict was found on the matter of law, against the direction of the Judge; the Judge at last ordered the Jury to find it specially; but they brought in a general verdict.

The King v.
Poole, E. 7 Geo.
2. Annals 23.
2 Barnard, K. B.
93, 447. S. C.
2 Kel. 210. Pl.
164.
Quo warranto
for acting as
Mayor of Li-
verpoole.

Resolved, That the certificate of the Judge reporting the matter of fact, as appearing before him, at the trial, is conclusive, nor can any affidavit be received against it, for that would be to try the matter again upon affidavit.—
Stands over.

N. B. It has been a doubt, which divided the twelve Judges in the case of the town of *Shaftesbury*, whether a new trial may be granted on an information in the nature of a *quo warranto*, after a verdict found for the defendant, as this suit partakes both of a civil and criminal nature; but it never was doubted, but that a new trial might be granted after a verdict for the King.

The King v.
Bennet, vide
ante. See And.
168, Hil. 4 G. 1.

In the case of *the Queen and the Mayor and Burgesses of Bewdley*, it was determined by the opinion of eleven Judges against Mr. Justice *Powell*, that if the jury find a verdict upon a point

Trin. 11 Ann.
Wil. Rep. 221.

Trin. 8 Geo. 2.
1734.

point of law, contrary to the direction of the Court, or find a general verdict where they are directed to find the matter specially, a new trial may be granted even after a trial at bar. The principal cause came on again, 8 Geo. 2, 1734. Mr. Justice *Fortescue*, who tried the cause, certified that the verdict was found against his direction, and that he was dissatisfied with it. There were four issues, the three first were preparatory to the last, and were excuses for the late Mayor's adjournment of the Court to a day after the day appointed by the charter, and the Jury found that there was no necessity for such adjournment, with which verdict the Judge reported himself satisfied. The last issue was, whether or no the defendant was duly elected Mayor, and the Jury found him not duly elected; and this was the verdict with which the Judge was dissatisfied. The point of law was, Whether the late Mayor had a power to adjourn the election of a new Mayor to a day beyond the charter-day?

Serjeant *Eyre*, Mr. *Bootle*, Mr. *Strange*, and others for the prosecutors: that though it is the general rule to grant a new trial on a Jury's finding the matter of law against the direction of the Judge, yet if it should appear to the Court above, that the Judge had mistaken the law, in his direction, and that therefore the Jury had found right, the Court would not grant a new trial, since the Jury could at length find no otherwise; and it would put the parties to the expence of a new trial to no purpose, for should they again be directed in the same manner as before, and find accordingly, the Court would grant a new trial for the mis-direction of the Judge.

†

And

And that it would appear in this case, by the record before the Court, that the Judge had mistaken the law, and that though his report is conclusive as to matter of fact, the Court having no other way to be satisfied of it, yet it is not so as to the matter of law, as that may be gathered in many cases from the record.

That this may be compared to the case of an immaterial verdict for the defendant, wherein it appears that he has made out no title by his plea, or confessed the action, judgment will be given for the plaintiff, as in the case of the *King and Phillips of Godmin, Stra. 394*, where on an information in the nature of a *quo warranto*, there was a verdict for the defendant, and yet judgment for the prosecutors, because the plea had not traversed the usurpation. *9 H. 6. 37. pl. 12*. It is stated, that if in debt, the defendant pleads such matters as shew that in point of law he owes the debt, and yet concludes that he owes nothing, the plaintiff may nevertheless claim judgment upon the confession; and that though there should be a verdict for the defendant, yet judgment will be given for the plaintiff. *2 Rol. Abr. 99. pl. 1. Lacy and Reynolds*; and another in the same book, in an action on the case for words, after a verdict for the defendant judgment for the plaintiff on the confession. *1 Salk. 173, Jones and Bodnam*, and in the same place *Staple and Heydon, Yelv. 169, Mullineux's case. Broome and Woodward, Trin. 4 Geo. 2. Trespass for entering plaintiff's house, and taking away his goods; the defendant justified for a distress for rent, and that the goods were appraised, and the appraisers sworn before the headborough, and*

Judgment,
confession.

Defendant
now by virtue
of the stat. 11
Geo. 2. c. 19.
§ 21. may plead
the general
issue, and give
the special mat-
ter in evidence.

the

the residue of the money returned. Upon this issue joined; verdict for the defendant, but judgment for plaintiff, because it appeared by the act of parliament, that the appraisers should be sworn before the sheriff or constable, whereas it was alledged in the plea that they were sworn before the headborough.

Easter, 4 Ann. A case in Serjeant *Salk.* manuscript notes; trespass for throwing down and carrying away stalls; as to all the trespass, but throwing down, the defendant pleaded Not Guilty; as to throwing down a special justification, in which the defendant admitted both the throwing down and carrying away the stalls. The Judge of *nisi prius* refused to try the cause, because the action was confessed; and afterwards on motion in the Court above it was held, that the Judge did right.

The following exceptions were taken to the opinion of the Judge :

First, That it appears upon the face of the record, that the defendant *Poole* was not elected Mayor agreeable to the charter, for the charter appoints the 18th of *October* for the day of election, whereas the defendant has set forth in his plea that he was chosen on the 19th, and that the act 11 *Geo. c. 4.* does not give a power to Mayors to adjourn the election at their own will, without any reason, to a day when their power is expired; neither does it give any authority even on an adjournment, to proceed upon a poll taken the first day, but they must begin *de novo*. That it appears upon the record that the late Mayor, whose power determined the day before, presided at the election, when the defendant was chosen;

chosen; whereas the act requires, that the next officer should preside, the Mayor's power being determined. That the statute directs the election to be begun between the hours of ten in the morning and two in the afternoon, whereas it appears by the defendant's plea, that this election began between eight and nine in the morning; that it appears that the defendant was elected the 19th of *October*, and yet he pleads an election for the year next ensuing, whereas by the charter his office expires the 18th of *October* next, which is within the year; on all which accounts it appears that this cannot be a lawful election, and therefore no new trial should be granted.

But *per* HARDWICKE, *Ch. Just.* A new trial ought to be granted in this case.

In the first place, that the general rule is, that if the judge of *nisi prius* directs the jury on the point of law, and they think fit obstinately to find a verdict contrary to his direction, that is sufficient ground for granting a new trial: and when the judge upon a doubt of law, directs the jury to bring in the matter specially, and they find a general verdict, that also is a sufficient foundation for a new trial.

But to those general rules there are some limitations as clear as the rules themselves; one is, that if the judge should direct the jury plainly and certainly wrong in point of law, and the jury should find contrary to his opinion, and it should appear to the superior court, under whose direction all trials at *nisi prius* are, (Salk. 643.) that the judge was undoubtedly mistaken; the court would not grant a new trial, because it would be putting the parties to trouble to no purpose; and if the next judge should direct the jury in like manner,

manner, and they find accordingly, there must be a new trial for mis-direction.

Another limitation is, that if it appear upon the record, before the court, that it is impossible that the defendant should have judgment, by reason of his bad plea, though the verdict were found for him, the court would not grant a new trial. But then these things must appear very clearly, and it must be, where every thing appears upon the record, that can possibly arise upon the trial, for if all the matter does not so appear, and the verdict may possibly prejudice the defendant in point of law, the court ought, in justice, to grant a new trial.

That in the present case it does not appear sufficiently upon the record, that the law is against the defendant, nor that his plea is so bad, that he could not have a judgment were the verdict found for him.

There are two points, one upon the common law, and the other upon the statute; and had the present case rested wholly on the common law, it seems that no new trial ought to have been granted; for the law, before the 11 *Geo. c. 4.* was taken to be, that the mayor's office determined at the end of the year, and therefore it seems that it would have been a void election, where the adjournment was made to a day after the expiration of his office, especially where it is done without cause.

But the 11 *Geo. c. 4.* was made to remedy such inconveniences; and on that act it ought to be tried again.

It seems, indeed it ought to have been the original intent of that act, to enable corporations to go to an intire new election on a subsequent

sequent day, where no election had been begun before ; but notwithstanding, as this is a remedial law, to prevent inconveniences arising from new elections of annual officers on the charter-day, if the words of the act are large, and general enough, to comprehend the continuing of elections begun on the charter-day, but not completed within that time, as the mischief is the same, the court ought to give a liberal construction to them ; the act says, that where, by any accident or default whatever, no election shall be made on the charter-day, they may proceed to an election on another day, &c. Upon this, supposing the Mayor had done wrong in making a voluntary adjournment, the wrong acts of officers were part of what was intended to be provided against by this act.

Another objection is, that the adjournment was made between the hours of eight and nine, instead of ten and twelve : but this mention of hours in the statute, is certainly directory, and not restrictive ; and intended to prevent surprise, by beginning at inconvenient times ; now as to what appears on this record, there is no pretence of surprise in the present case.

Roll's Abr. The case of *Lansdown*, that corporation chose their officers eight days after the charter-day, and adjudged good, for that the day was only directory.

The next objection is, that the Mayor, whose office had expired the day before, presided at this election, and did that appear on the face of the record, it would be a strong objection in favour of the prosecutor ; but it does not, therefore the whole matter not appearing upon the record, it ought to go again
to

to trial, that if the jury should find a special verdict, the facts might come more fully before the court.

As to the objection, that it is pleaded to be an election for the year next ensuing, this may be, as it were, a technical year created by the act of parliament, as in corporations where the charter determines the office on a day after a moveable feast, the officers are nevertheless said to be chosen for a year.

The thing that governs greatly in this determination is, that the point of law is not to be determined by juries; juries have a power by law to determine matters of fact only: and it is of the greatest consequence to the law of *England*, and to the subject, that these powers of the judge and jury are kept distinct; that the judge determine the law, and the jury the fact; and if ever they come to be confounded, it will prove the confusion and destruction of the law of *England*.

The verdict given in the present case may prejudice the defendant on a writ of error, since for any thing that can appear to a superior court, the jury might have found their verdict on this, that the defendant had not the majority of votes: so that though the law should be with him, he is yet concluded, as they might have found it upon the fact.

The Court concurring in opinion, a new trial was granted, on the common rule of payment of costs.

The St. Ives Causes.

Rex v. Praed,
or Rex v. Edwards. M. 9 G.
3. B. R. 4 Burr.
2257.

A criminal motion was put off, till the validity of a rate should be tried in a feigned issue, "Whether it was an equal, or a partial

" tial one." And a verdict having passed *for the defendant*, upon such issue,

Mr. Solicitor-General (*Dunning*) moved, and was seconded by Sir *Fletcher Norton*, for a new trial; the verdict having been given *contrary to evidence*.

But the Court were clear against granting a new trial; because it was within the *same reason* as if it had been in a *criminal* prosecution. For, as this issue was directed in order to know " Whether this was an illegal and " partial rate;" and if it had been found to be partial, the consequence would have been either an attachment or an information; it was just the same thing, as if it had been a verdict found for the defendant, *upon an information*: and if it *had been upon an information*, the Court would not have set aside the verdict and granted a new trial, although the acquittal had been contrary to the weight of the evidence.

However, it was agreed that when the original motion should come on again, it would be open to any *other* objections, to the legality of the rate; only taking it for a fact, " that it was *not* a partial one."

The first of these was, an information in the nature of a *quo warranto*, calling upon the defendant *Thomas Amery*, to shew by what authority he claimed to be an alderman of the city of *Chester*.

The defendant, after having *pleaded* that the corporation of *Chester* was a prescriptive corporation, set forth a charter granted in the 37th year of King *Charles* the Second, by which the citizens and inhabitants of the city of *Chester* were incorporated. That the char-

Verdict for defendant against evidence, refused to be set aside, considering the proceeding as of a criminal nature.

The King v. Thomas Amery. Same v. John Monk. H. 27 G. 3. B. R. Durn and East. 1 V. 575.

Quo warranto against defendant acting as alderman of Chester.

Questions as to usage; acceptance of charters; corporation by pre-

scription; and
by charter; of
the suspension
of franchises;
and various
other points of
law.

ter directed, that the corporation should consist (*inter alia*) of a mayor, recorder, twenty-four aldermen, and forty common-councilmen, &c. and it appointed the first twenty-four aldermen by name. The defendant then averred, that the said charter, as to the election of aldermen of the said city, was duly accepted and agreed to by the said citizens, and inhabitants. And then deduced a regular title as alderman under that charter.

Replication 1st. That the mayor and citizens, at the time of making the said charter, were not, nor had from time immemorial been, a body corporate, &c. and issue.

2dly. That *Charles* the Second did not grant the charter mentioned in the plea; and issue.

3dly. That the charter 37 *Car.* 2. as to the election of aldermen, was not duly accepted by the citizens, and inhabitants; and issue.

4thly. That certain persons in the said charter mentioned did not become, nor were, aldermen of the said city; and issue.

5thly. That the mayor, aldermen, and common council, have not exercised the franchise of electing aldermen according to the intent of the said charter; and issue.

6thly. That the defendant was not at the time in the plea mentioned a citizen, and one of the common-council; and issue.

7thly. That the defendant was not elected an alderman by the major part of the then mayor, aldermen, and common-council, &c. and issue.

8thly. That the defendant was not duly admitted, &c. and issue.

The *second Replication* stated, that in the 35th year of the reign of *Car.* 2. an information

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tion was filed, in the nature of a *quo warranto*, against the mayor, and citizens of *Chester*; that in *Hilary* term, 35 and 36 *Car. 2.* there was a judgment (by default) by the Court of *King's-Bench*, that the liberties, privileges, and franchises in the said last-mentioned information should be seised into the hands of the king, until the said Court there further ordered. That in *Trinity* term, 36 *Car. 2.* it was adjudged by the said Court, that the said liberties, &c. should be seised into the hands of the king, and remain in his hands, and that those liberties, &c. should be extinguished, and the said mayor and citizens expelled and removed therefrom; which judgment was in force at the time of making the charter of *Car. 2.*

It then alledged that there were other matters in the charter of *Car. 2.* and particularly that the king willed that the charter should be sealed, as well under the great seal of *England*, as under the seal of his county Palatine of *Chester* (a), which were not stated in the defendant's plea, and that the charter, not being accepted by the said citizens and inhabitants, as to those as well as all other matters therein contained, was void.

The *third Replication* stated, that *Car. 2.* by his said charter reserved full power to himself, his heirs and successors, at his and their free will and pleasure to remove the mayor, recorder, common-clerk, or any one or more of the aldermen, common-council-men, &c. of the said city, by an order of privy-council to them respectively signified; and that as often as he, his heirs, and successors, by any such order made, should declare any such mayor, &c. to be removed from his or their respective

(a)
The king died on the 6th February 1684, two days after granting this charter.
Vide post.

rive offices, that then and from thenceforth the mayor, &c. and all or any of them, so amoved from their respective offices, should without further process, actually be amoved, &c. and that in every such case, some other fit person or persons, within a convenient time after any such amotion, should be chosen, &c. in such manner as by the letters patent was before directed, into the place and office, &c. of any person so amoved. That King *James 2.* by an order of privy-council, dated the 12th of *August*, 1688, according to that power, amoved all the corporators then in being, which was regularly signified to them; wherefore the power in the said charter, as to the election of aldermen, ceased and determined.

The *fourth Replication* stated a charter of the 21st *Hen. 7.* which was accepted, and a confirmation of it in the 16th *Eliz.* which was also accepted; that both those charters were in force at the time of the judgments in *quo warranto*; and that those judgments were in force on the 17th *October*, 1688. That King *James 2.* afterwards on the 26th *October*, 1688, granted a charter of restoration to the mayor and citizens of *Chester*, which was accepted. Wherefore the charter of the 37th *Car. 2.* after the granting and acceptance of the charter of restoration, was of no further effect.

The *fifth Replication* stated a charter of incorporation in the 21st *Hen. 7.* with a power of electing aldermen annually, by the corporation at large, which was accepted; a confirmation of it in the 16th *Eliz.* which was also accepted, and that both those charters were in force at the time when the charter 37 *Car. 2.*

was

was granted: wherefore it was of no force as to the election of aldermen.

Rejoinder, That the charter of 37 *Car. 2.* was accepted by the citizens and inhabitants, as to all the matters contained therein; and 9th issue thereon. That the order in council was not signified as stated in the replication; and 10th issue thereon.

That the charter of 37 *Car. 2.* continued in full force as to the election of aldermen from the time of the granting and acceptance thereof, until the time of exhibiting the information; traversing the acceptance of the charter of *James 2*; 11th issue thereon.

That after the granting of the charters of *Hen. 7.* and *Eliz.* there were judgments of ouster against the mayor and citizens, in the 35th *Car. 2.* &c. traversing the charters of *Henry 7.* and *Eliz.* being in force at the time of the charter of *Car. 2.* and now; 12th issue thereon.

This cause was tried at the last assizes for *Salop.* before *Eyre*, Baron, when the Jury found a verdict for the prosecutor, on the 3d, 5th, 9th, 10th, 11th, and 12th issues; and for the defendant on the 1st, 2d, 4th, 6th, 7th, and 8th issues.

The pleadings in the other cause of the *King* against *Monk*, were similar to these, excepting that they were relative to the office of *common-council-man*. On a motion for a new trial, a very considerable body of evidence was read from the report of the learned Judge, a detail of which it is not thought necessary to enter into here; the report of this case being given only for the purpose of shewing the different points of law which arose in it.

In general it appeared, that the select body named in the charter of *Car. 2.* assumed their corporate functions, and acted under that charter for about three years, during which time about thirteen of the old freemen were admitted under the new charter. Th: upon the order of council of *James 2d.* the old corporation resumed their functions, and the members of the other retired. The restored corporation returned to their antient mode of proceeding in most articles; but in some instances, and particularly in the election of aldermen and common-council, they had in general continued to proceed according to the method directed by the charter of *Car. 2.* excepting during four years, soon after the revolution: during which time they proceeded nearly, though not entirely, according to the charter of *Hen. 7.* They likewise continued to hold the hospital lands, and a fair, to which it did not appear that they had any title, but under the charter of *Car. 2.* It also appeared, that the election of aldermen by the select body, had been made previous to the charter of *Car. 2.* by virtue of a bye-law under the charter of *Hen. 7.*

It is also to be remarked, that the charter of *Charles the Second* did not appear to have the seal of the county palatine, according to the directions of the charter; and evidence was given to shew that there was no entry in the seal-keeper's books of the county palatine, of any fees having been paid for affixing the county palatine seal (a).

(a) Ante.

The learned Judge, after stating particularly all the evidence, concluded his report with observing, that, in his directions to the Jury, he

he had told them that the right of election of aldermen of this corporation, in the mode contended for on the part of the defendant, ought to be supported if possible. That the usage had prevailed in *Chester* for a great number of years, and was reasonable in itself. But that on a general view of the case in evidence, he found it extremely difficult to support it under the charter of *Charles* 2d. the granting of which appeared to have been a measure of the times, and which, from the moment when it became necessary to tread back those steps in the latter end of the reign of King *James*, seemed to have been entirely laid aside. That in summing up the evidence he had assumed that there was no contrariety. That the Jury might conclude upon it, that the corporation of *Chester* was a corporation by prescription, and under charters, at the time of the judgment in *quo warranto*; in which however he stated, that he had differed from the counsel on both sides. That the franchises of the corporation were in fact suspended by that judgment. That the charter of *Charles* 2d. was acted upon for three years next after the granting of it. That after the charter of restitution was granted, the officers of the old corporation resumed their places; and that from that time they went on without appearing to advert in any one instance to the charter of *Charles* 2d. as the authority under which they were to act. For though it was true that one of the witnesses had stated in his evidence, that, as he understood it, the select body was now somewhat differently constituted from what it appeared to have been before the charter of *Charles* 2d. in respect of the two sheriffs making or not making a part of the forty common-council-

men; and the elections of mayor and recorder, are now approved of by the King, which is conformable to the charter of *Charles* 2d. and is not required by the charter of *Hen.* 7.; that those, and a few other instances which might occur, of apparent conformity to the charter, having obtained, without any actual reference to it; and in a multitude of other instances, the usage being in direct contradiction to the charter, he had thought there was in effect no evidence that the old corporation had ever recognized that charter. As to the election of aldermen, it was clear that the usage had existed a great number of years, before the charter of *Charles* 2d.

That the operation of law upon this state of the fact, applicable to the issues in this cause, was the next thing to be considered. That he went into the discussion of that question, with a considerable degree of hesitation in his own mind. That he was not perfectly satisfied, as to the legal effects of the judgment in *quo warranto*; or of the charter of restitution; especially as opposed to the charter of *Charles* 2d. which had intervened. That he had hazarded this opinion; that the judgment in *quo warranto*, being a judgment by default, where no cause of forfeiture appeared upon the record, did not dissolve the corporation. That it only seized the franchise into the King's hands, and thereby *suspended* the exercise of the functions of the corporation. That the charter of *James* the 2d. restored the franchise to the *old* corporators; and that after that restoration, the charter of *Charles* the 2d. was to be considered in the same manner, as if it had been granted before the judgment in *quo warranto*; in which case, without an *acceptance* by the old

old corporation, it would have no effect within the district wherein the old corporation had power to act. And that there was no such acceptance; which was substantially determining the issue upon the acceptance of this charter, against the defendant.

Seeing the case in that light, he had treated the issue upon the notification of the order of amotion, as of no great consequence in the cause; but however that he had directed the Jury, that there was evidence of the notification, proper to be submitted to them.

The learned Judge then stated, that it had since occurred to him, that the question upon the notification of the order of amotion, might become very material in some events, namely, if it should be finally resolved, that the charter of *James* the 2d. did not operate to restore the old corporation; or that the restitution of the old corporation, did not dissolve or displace the new corporation, under the charter of *Charles* the 2d. if the old corporation was never restored, and the new corporation, in consequence of the order of amotion, was deprived of all its officers, and consequently could hold no legal assembly, or use any means to perpetuate itself, (and in point of fact, that corporation never did assemble again) it seemed as if there was no lawful corporation in *Chester* at this day. Or if the old corporation was well restored, but the restoring to them their franchise of being a corporation, did not operate to displace or dissolve the new corporation, it should seem as if there would be two bodies corporate existing in *Chester* at the same time; but in consequence of the order of amotion, one effectually disabled to act, and now probably dissolved, by the natural death of its members,

members, the other active and perpetuating itself in the regular course. And in that case the question now depending would be a question touching the election of an alderman of the old corporation; in which case it seemed to be impossible to maintain the election under the charter of *Charles* the 2d. it being in his judgment most clear, that the old corporation did not accept that charter.

That at the trial the counsel for the defendant had insisted, that the judgment in *quo warranto* had dissolved the corporation; and that the charter of *Charles* the 2d. created a new corporation. That the charter of *Jac.* the 2d. could not restore the corporation which had been dissolved, but might be accepted by the new corporation, and might enlarge the powers of that new corporation. And that the question in the third issue was, touching the acceptance of the charter of *Charles* the 2d. by the citizens at large, and not by the old corporation. But, he stated, that it had since occurred to him, that it was a question which might deserve consideration, whether upon the issues joined upon these pleadings, it was open to the counsel for the defendant to put the case in that manner; the plea stating in effect, that at the time of granting the charter of *Charles* the 2d. there was a corporation by prescription, existing in *Chester*, which seemed to confine the question of acceptance in the third issue, to an acceptance by that prescriptive corporation.

The *Court* here observed, that if all the points of law, which might arise in this case, were to be gone into, they were of too much importance to be decided when the bench was not full.

And

And they recommended it to the counsel to confine themselves in their arguments to the third, fifth, and ninth issues, on the acceptance of the charter of *Charles* the Second; because if it should turn out either to be a verdict against evidence, or that the question was not properly left to the Jury, as to those issues, to exercise their judgment upon, that would be a sufficient ground for a new trial, and the questions of law would be open hereafter.

Adair Serjeant, *Wood*, *Milles*, *Lane*, and *Topping*, against the rule, argued very fully on the verdict on those issues, as it was warranted by the evidence alone; in the course of which two questions were made.

1st. That the charter of *Charles* the Second, was not accepted in point of law; because an acceptance of a charter must be by a majority of those persons to whom it is granted. Now it appears on this charter itself, that it was granted to the citizens and inhabitants of *Chester*. And the question is, Who are meant by *citizens*, as contradistinguished from *inhabitants*? It could only mean those persons who had been incorporated before the judgment of *ouster* in the *quo warranto* information, and who were the ancient freemen of the city.

According to *Bagge's* case (a), a charter must be accepted by a majority of the persons to whom it is directed, for the acceptance of a few will not bind the rest. So if a part of a corporation apply for new privileges, it will not bind the rest, unless they consent. The inhabitants of a town cannot be incorporated without the consent of a major part of them (b), and without their consent the charter of incorporation is void. In the *King* against

Alkew

(a)
1 Rol. Rep. 226.

(b)
2 Brownl. 100

(c)
 Burr. 2100.

Askew and others (c), Mr. *J. Yates* said the Crown cannot compel persons to become corporators against their assent; and that consent can only be testified by their being admitted. But in this case there was no evidence which tended to shew that this charter had been accepted by a majority of the old freemen, thirteen only of whom were admitted; and the proof of that issue was on the defendant. This partial acceptance, therefore, could not operate. But it was contended at the trial, that the charter was at all events accepted as to the election of aldermen: now that argument cannot be supported, if (as was also contended) the judgment of *ouster* entirely dissolved the whole corporation, for then it would be a grant of franchises to a new body of men, who could not in point of law accept the charter in part only. Then, according to the defendant's argument, this charter must be considered to have been accepted in *toto*, or not at all. And if the Jury were not warranted by the evidence to find a verdict for the defendant on the ninth issue, in point of fact, they could not find for him on the third in point of law: and if any part of the charter was not accepted, the ninth issue must fall to the ground, for that is, that it was accepted *in all things*. The opinion of the Court in the case of the *King v. Johnson* (a), is extremely strong to shew that the charter of *Charles* the Second was never accepted.

(a)
 Durnford & East
 1 V. 367.

2dly, But even if the Court should be of opinion with the defendant on the acceptance, yet the charter itself is void on two grounds; in which case it would be nugatory to grant a new trial upon the question of acceptance of a charter,

charter, which if accepted is void. 1st. A charter granted in a county palatine, must have the county palatine seal. The county palatine was united with the Crown in the reign of *Edward* the First. And in *Selden* (b) it is said, "that the laws and rightful usages of a county palatine are to be preserved." It was by King *CHARLES* as *Earl of Chester*, and not as *King of England*, that this corporation was created. Many cases have adjudged, that when a seal is necessary to the validity of a grant within a county palatine, it must be under the seal of the county palatine. *Moor*, 874. *Lutw.* 1232. A presentation to a living within the county palatine, may be good without the seal of the county palatine; and the reason of that is, because it may pass by parol. But a grant of the next avoidance is void, for want of the county palatine seal, 2 *Rol. Abr.* 182. *D.* 1, 2. 1 *Brownl.* 182. It is sufficient, in prescribing for a franchise, to say that it is within his county palatine, which has *jura regalia*, and by reason of that he claims such franchises; of which one is, to create corporations. 2 *Bulstr.* 226, 7. In answer to an observation from the Court, that the Chief Justice, and Attorney-General of *Chester*, were appointed under the great seal; it was said that by the *stat.* 27 *H.* 8. c. 24. §. 5. justices of assize, &c. within the county palatine of *Lancaster*, were to be appointed under the king's usual seal of *Lancaster*, in manner and form as hath been accustomed. And it appeared by the 18th section of that act, that Sir *H. Englefield* had been appointed justice of *Chester* and *Flint* by letters patent under the seal of the county palatine.

(b)
Parke. 2. c. 5.
p. 530.

And

And that the appointment of the Chief Justice of *Chester* under the great seal of *England*, was by virtue of the *stat. 34th and 35th H. 8. c. 26. §. 10.* That as to the Attorney-General, he was appointed under the great seal: because he acted as well without the county palatine as within it. And 2dly. This charter is void on account of the general power of amotion reserved to the king. It is a condition which the law will not endure; the consequences of which would give the king a power which the law has expressly denied him. *Palm 501. Sir W. Jones, 168.*

A grant by the king to the subject, which is against law, is void. *2 Rol. Abr. 164. 2 Inst. 533. 1 Rep. 43. b. 5 Rep. 55. b.* And though where to a grant by one subject to another a condition is annexed, which is either impossible or illegal, the condition only is void, yet in the case of a grant by the king, the whole grant is void. *2 And. 156. 2 Freem. 17.*

Bearcroft in support of the rule observed, that the third, fifth, and ninth issues, altogether formed a question of fact only. And as the learned Judge had mis-directed the Jury, in telling them the question was, whether the charter of *Charles the Second* was accepted by the *old corporation*, instead of the *citizens and inhabitants*, the defendant was intitled to a new trial. The question left to the Jury was not the true one; for the issue joined was on the acceptance by the *citizens and inhabitants*, to whom it was directed, and not by the *old corporation*, who (the defendant contended at the trial) had no legal existence after the judgment of ouster. The old corporation were not

not known by the name of the *citizens* and *inhabitants*. Those terms were descriptive of the persons to whom the charter of *Charles* the Second was directed. The word "citizens" does not mean "freemen," as freemen of the old corporation; for they were extinct at that time; but the expression may be accounted for in this way; there had been a city, and a corporation; in common parlance the inhabitants were known by the name of the *citizens* of *Chester*: The word "inhabitants" was added for the purpose of preventing any mistake; and they are used as convertible terms. The acceptance of a charter, in this case, was a pure simple question of fact, without any mixture of law. And this has been confounded in the argument by the counsel against the rule, with the case of a charter granted to an existing corporation. He admitted that it would be a question of law, whether a part of an existing corporation might or might not have accepted a charter; or whether they could partially accept or not. But this being a charter to a new corporation, there was sufficient evidence given at the trial to be left to the Jury to determine as to the acceptance of it in fact.

Bower, Leicester, Plumer, and Manley, were to have argued on the same side; but they were stopped by the Court.

ASHHURST, J.—The only questions for our present consideration are, Whether the Jury have done right in finding their verdict as they have done, against the acceptance of the charter of *Charles* the Second; and whether the Judge, who tried the cause, was or was not correct in his manner of summing up to the Jury?

As

As to the manner in which the question was left for the Jury upon this part of the case, I am of opinion that the Judge was in some degree mistaken; for he has stated to us pointedly, that he told them, that he thought there was in fact no evidence that the *old corporation* had accepted the charter of *Charles* the Second. In a matter of such consequence, I should have thought, that if it were only a question of fact, at all events there was evidence on this point, sufficient to be left openly and fully to the consideration of the Jury, without any such strong directions as were given. In the first place I think the learned Judge was mistaken in telling the Jury, that the question was, whether the charter of *Charles* the Second was accepted by the *old corporation* or not. That was not the issue upon the pleadings; for the words of the issue are, "That the letters patent were not duly accepted and agreed to by the *citizens and inhabitants* of the city of *Chester*;" which could not mean the *old corporation*. For it could only be accepted by the persons to whom it was directed at the time it was made: but the *old corporation* did not exist at that time; for they were dissolved by the judgment in the *quo warranto*. They no longer existed as a body. If they were not dissolved, the question might have been different; therefore, in reason, the only question could be, whether this charter was accepted by the persons to whom it was addressed, who were the *citizens and inhabitants*. Now this question was not left to the Jury at all; the only question having been, whether the charter was accepted by the *old corporation*.

Now with regard to the facts which were laid before the Jury in proof of the issue, respecting the acceptance by the *new* corporation, there were many instances: indeed the Judge himself says, that the evidence was all one way during three years. Several instances are stated of acts done by the new corporation, which could only have been done under the charter of *Charles* the Second; [which Mr. *J. Ashburst* here enumerated.] These were such a degree of evidence as should have been left to the Jury: and it does seem to me that the evidence was all on one side during that period. The evidence of those acts should at any rate have been left to the Jury, whatever verdict they might ultimately have given. And if they had been of opinion, that the charter had been accepted, and acted under, during those three years, that would have been conclusive. For the charter once accepted and acted under, for three years, was accepted as much as it could be, and must ever afterwards be taken to have been accepted; and the corporation could not afterwards determine upon keeping those franchises which were beneficial to them, and rejecting others which were not so. At all events this evidence should have been left to the Jury. And I agree with the learned Judge in the opinion which he has delivered, that courts and juries ought to lean in favour of ancient usages, especially if they tend to preserve the peace and quiet of corporations.

As to the questions of law which may arise in this case, they are matters for future consideration; therefore I shall not enter into them at present. And as they are of great

importance, the decision ought to be satisfactory to all the parties.

As this is a question on which the existence of the corporation depends, and as the ninth issue is thought the most material, I am of opinion that it should be tried again.

BULLER, J.—This is an information in the nature of a *quo warranto* against the defendant, to shew by what authority he claims to be an alderman of *Chester*? The defendant, in answer to this information, has stated a charter of the 37th of *Charles* the Second, which he says was granted, not to the mayor and citizens, who were the old corporation, but to the citizens and inhabitants, and accepted by them: he has then derived his title under it.

On this plea, three issues have been taken.

1st. That the charter was not granted. 2dly. That it never was accepted by the citizens and inhabitants. 3dly. That in this charter there was a clause which enabled the king and his successors, by an order of privy-council, to put an end to this corporation, by a power of amoving them, without assigning any cause; and that King *James* the Second made such an order, which was notified to the corporation. On these three issues, the event of the cause must finally depend.

The others might have been dispensed with. Though I have stated those three issues, they are more than are necessary, in order to dispose of the question now before us.

For as to the objection, which was taken by one of the counsel against the rule, that the charter of *Charles* the Second was void, because it had not the seal of the county palatine of *Chester* affixed to it, there is no founda-

tion for it. The cases which were cited, do not apply; for they are cases of grants within the county palatine of *Lancaster*. And it is observable that, even in one of those cases cited, it was held by Lord C. J. *Treby*, that a corporation made within the duchy, and not in the county palatine, is without warrant (a). But he said within the county palatine, the king *may* create a corporation under the duchy seal, because the Duke of *Lancaster* had *jura regalia*. But it does not follow that, because the king may create a corporation within the county palatine, under the duchy seal, he *cannot* do so under the great seal.

Besides, cases which arise within the county palatine of *Lancaster* are not applicable to the present. They depend on a particular statute (b), which is confined to the county palatine of *Lancaster*. With respect to offices granted under the great seal of *England* to be exercised in *Chester*, it is said that they depend on the statute 34th and 35th *Hen. 8. c. 26*, which (as it was contended) enacts, that offices in *Chester* shall be granted under the great seal of *England*, and the chief justice is particularly mentioned. But on adverting to that statute, the argument does not appear to be well grounded; because that act relates only to *Wales*, and not to *Chester*. Besides, before the passing of that statute, the crown had used to grant offices in *Wales* under the great seal: for there is a clause (c) in that statute, which says, that commissions under the great seal *already granted* shall be in force. Another circumstance, worthy of observation, is, that the sheriffs of *Chester* are appointed at *Westminster* in the same manner as the other sheriffs in *England*. It is also to be remarked,

(a)
Lutw. 1237.

(b)
1 Ed. 4.

(c)
S. 11.

that the charters of *Charles* the Second, and *James* the Second, are neither of them under the seal of the county palatine of *Chester*; but they are both under the great seal alone. However, this is not the point now before the Court, which is only as to the acceptance of the charter of *Charles* the Second.

And as to that, it is material, first, to consider to whom that charter was granted; and, secondly, by whom it is said to have been accepted. I think there was a mistake at the trial by the Judge, in leaving the question to the Jury, whether the *old* corporation had accepted this charter? Nothing is more clear than that the crown, at the time of granting this charter, considered the old corporation of *Chester* as totally annihilated, and extinguished. It was not granted to them as to a corporation then in existence. And with regard to the term "*citizens*," the counsel in support of the rule has given the true answer to that observation. Then the question is, whether the citizens and inhabitants had accepted the charter of *Charles* the Second or not? I feel less difficulty in differing from the learned Judge, who tried the cause, because he has stated to the Court that he himself entertained considerable doubts at the time, and that he hazarded an opinion, that the judgment by default in the *quo warranto* did not dissolve the corporation, but that it only seized the franchises into the king's hands, and thereby suspended the exercise of the functions of the corporation. and on that ground considered the question as being whether the old corporation accepted the charter or not?

As to the facts of the acceptance stated to have been proved, there is such a body of evidence

evidence during the course of three years, as in my opinion leaves the question without a doubt. And if the corporation accepted the charter only for an hour, that is conclusive for ever; it cannot afterwards be said, that they had not accepted.

[Here Mr. *J. Buller* commented very fully upon every part of the evidence, from whence he took occasion to observe, that there was sufficient evidence to have been left to the Jury, as to the acceptance of the charter of *Charles the Second*, by the citizens and inhabitants of *Chester*.]

I agree with the learned Judge, that the election of the defendant should be supported if it can be so.

If on the evidence there is no ground for saying that the charter was accepted, it will be impossible to support it. But all the evidence goes to shew an acceptance; and there was no contrariety.

Another objection has been made, that it does not appear, negatively, that the charter was not accepted by a *majority* of those named in it. I am by no means satisfied that it was necessary that it should be accepted by a majority of them. I hold that there is a great difference between a charter granted in general terms, to incorporate the inhabitants of a city, and a charter like the present, which creates distinct parts of the corporate body, fills up some of the offices by name, and leaves it open to them to elect a number of freemen.

What is said by Mr. *J. Yates*, in the case cited from *Burrow*, exactly agrees with what I have just laid down. That was the case of the college of physicians. In the charter granted to them, six persons by name, and all

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others of the faculty, of and in the city of *London*, are made a body corporate: but the Court held that all the practising physicians in *London* were not, by virtue of this charter, members of the corporation.

(a)
4 Burr. 2199.

Lord *Mansfield* said, that the corporation were only bound to admit every person, whom they, on examination, thought fit to be admitted; and that any person who came within that description, had a right to be admitted. *Yates, J.* said, (a) “ I am far from thinking “ that all the men of and in *London*, then “ practising physic, were incorporated by the “ charter. The *immediate* grantees under the “ charter, were the six persons particularly “ named in it. The rest were to be admitted “ by them. They were not, *ipso facto*, made “ members. They were first to give their “ consent, before they became members: they “ could not be incorporated without their “ consent.” Now, that charter seems applicable to the present case. For the king, by this charter, appointed a certain number of aldermen, and a certain number of common-council-men. These, then, according to the language of Mr. *J. Yates*, are the immediate grantees of the crown; and a power is afterwards given to them, to swear freemen upon their request, they first taking the oaths. Therefore, it appears to me, that these freemen stand in the same light, in which those persons do, who practise physic in *London*. The corporation have a power delegated to them, to swear in certain persons on their doing particular acts. But if the law were not so; if any number of freemen had accepted, it would have been sufficient: for the freemen are an indefinite body. And, in a corporation consisting

sisting of different integral parts, if any of the freemen, being an indefinite body, attend the meetings of the corporation, it is sufficient. It is not required, in all cases, that a majority of the whole body should be present. And if a smaller number than a majority of an indefinite part of the corporation, are sufficient to constitute a lawful assembly for doing corporate acts, after they are incorporated, it will be difficult to find a reason why the same number may not accept the charter. Whether after hearing the opinion of the Court on these points, the parties may choose to go to trial again, in this case, is for their consideration. But if the cause should be tried again, these pleadings are so defective, that I recommend it to both parties, that they should be amended.

To begin with the plea: it sets out with stating, "that the mayor and citizens of *Chester* have, from time immemorial, and by " divers charters, and grants of divers kings " and queens of *England*, been a body corporate and politic, in deed, and in fact."— It is impossible to suggest any reason why this averment was made: it was likely to have the effect which it produced at the trial, of embarrassing the cause, and raising the doubt whether the charter of *Charles* the Second should or should not be considered to have been granted to a corporation then in being. It is true, that the plea has not actually stated that they were a corporation, at the time when the charter of *Charles* the Second was granted: but this allegation is altogether unnecessary. The defendant's case is, that this was an *original* charter of incorporation; and therefore it was immaterial for him to state a prior

corporation. . The defendant has then stated the charter in the proper way, " that it was " accepted by the citizens and inhabitants ;" but this is followed by another averment, which is quite new, and which is the foundation of another issue, namely, " that the mayor, aldermen, and common-council-men, or the greater part of them, did exercise the liberty, privilege, and franchise, of making, electing, and choosing of aldermen of the said city, according to the direction of the said charter." Now this is perfectly nugatory and unnecessary ; for, if the charter were accepted, they were bound to act under it : this Court would have compelled them to act under it. But the plea, in speaking of the manner in which it was accepted, only says, that the charter, as to the election of aldermen, was duly accepted. It is impossible to support this issue in any way. The averment proceeds on a mistake, by supposing that a charter may be accepted in part, and rejected as to the rest. The only instance in which I have ever heard it contended that a charter could be accepted in part only is, where the King has granted two distinct things, both for the benefit of the grantees : there, I know that some have thought, that the grantees may take one, and reject the other. However that may be, it cannot extend to this case. This corporation must either have accepted in *toto*, or not at all : if they could have accepted a part only of the charter, they would have been a corporation created by themselves, and not by the King. If a charter directed that the corporation should consist of a mayor, aldermen, and twenty-four common-council-men, they could not accept the charter for the mayor and

and aldermen only, omitting the common-council-men. It is impossible to support this part of the plea; therefore this allegation, confining the acceptance of the charter as to the aldermen only, ought to be amended. In the replication, the prosecutor has taken the issue on the first averment larger than the plea; for it says, "that the said mayor and citizens, *" at the time of the making of the said letters patent in the said plea mentioned,* were not, nor have, from time immemorial, been a body corporate, &c." neither can this be supported. There are three other replications; one of which introduces the order of privy council for amoving the corporation. I read that part of the charter in a different sense from that in which it is understood by the counsel on either side: for the charter states, that the King reserves to himself "a power by any order of him, his heirs, or successors, in privy council made, under seal, to them respectively signified, to amove them, or any of them." But on looking farther into the charter, it appears to me, that that clause does not warrant a general amoval of the whole corporation. It only means, that the King intended, and has by the words of the charter, reserved to himself the power of amoving one or more of the individuals of the corporation who misbehaved, and not of destroying the corporation itself: for it afterwards directs, that in case of such amoval, the *remainder of the corporation* should elect others in their room in the manner directed by the charter. If that be the true construction of the charter, one of the replications is entirely out of the question.

With respect to the other replication; it is
idle

idle on this record to state what was the ancient constitution of the corporation, before the judgment of ouster in the *quo warranto*; because the defendant has by his plea put his election upon the charter of *Charles* the Second: he must stand or fall by that; and therefore it was nugatory to state the charter of *Henry* the Seventh, or any other charter granted to this corporation.

I have thrown out these hints, that the parties may take them into their consideration. But if this record goes down to trial again in its present state, and the Court should entertain the same opinion that I do now, I do not know any case that can call more for the animadversions or censure of the Court.

Rule absolute.

New trial in
quo warranto,
where verdict
for defendant.

In the case of the *King* and *Francis* in *quo warranto*, E. 28 G. 3. new trial granted, though verdict for defendant; the Court paying no attention to the objection that it was a criminal prosecution. It is in the nature of a civil proceeding. The *King v. Bennet* was mentioned, but the Court paid not the least attention to it.

I believe, in the *King v. Francis*, one ground of the new trial was, that evidence was produced on the part of the defendant that prosecutor could have contradicted, but was *surprised*, not expecting such evidence would have been given, and was therefore, at the trial, unprepared to answer it.

IX. Of other Matters respecting new Trials, &c.

(12.) Of new Trials in Criminal Prosecutions.

(b.) In actual Criminal Prosecutions.

Vide ante IV. *Rex v. White and Ward.*

INDICTMENT for perjury, and the defendant acquitted; and a motion was made for a new trial, on behalf of the King, because several witnesses were absent. *Windham*, J. held this grantable, not being touching life; to which it was answered, that new trials may be in criminal cases, at the prayer of the defendant, where he is convicted, not at the suit of the King, where the defendant is acquitted, any more than in criminal cases, which are capital; and where two cases were cited *ex parte regis*; *Twisden* said, this was in the late troublesome times, *et ex assensu partis*. And upon this *Cur' adv' vult*, and gave day to search for precedents. *Note*, that afterwards, *Mich. 13 Car. inter Regem et Bowden*, an information for perjury, and the defendant acquitted; and motion for a new trial upon affidavit, that one of the witnesses was absent by reason of sickness, denied per *Cur'*, the party being acquitted, may not be tried again, but after

Anon. M. 12
Car. 2. B. R.
1 Lev. 9.

A new trial shall not be upon an acquittal of the defendant in criminal and capital cases, otherwise upon his conviction.

This a prosecution for perjury.

V. post.

after conviction, a new trial may be had for the defendant upon good cause; and *Trin'* 15 *Car. 2. Rex versus Fenwicke and Holt*, information for perjury, and defendant acquitted; motion for a new trial upon affidavit, that some of the witnesses were kept away by the practice of the defendant. *Windham, J.* held this grantable, being only in a criminal case, not capital. *Keeling* said, no precedent could be shewn of a new trial in a criminal case, any more than in a capital one, for the defendant's *character* shall not be drawn in question several times, for the same thing, any more than his life. *Forster* and *Twisden* directed an information to be brought for the practice, and that if it should be found, a new trial should be granted, to which *Windham, J.* agreed.

M. 15 Car 2.

Vide post.

And this case being moved again, *Forster, Twisden*, and *Keeling*, continued of the same opinion. *Windham contra*, and said, that in an information for the practice, he would not have the same punishment as he would have for the perjury, and therefore held a new trial grantable, without information for the practice. *Ceteri*, the course of the court is the law of the court, and it is better that one innocent person suffer, than that the law should be changed; *et Hil. 15 & 16 Car. 2.* in the case of Sir *John Jackson*, where he, upon an indictment for perjury, kept back the witnesses; information was brought against him for the practice, and he was convicted, and fined a 1000 marks; and therefore, (*Levintz* says) as I suppose, a new trial was granted; this information being brought by the direction of the Court with that intent, but I did

not

not hear that any rule for a new trial was given at this time.

In an information for *perjury* found for the King, it was moved upon several affidavits, to have a new trial; and it was doubted by the Court, that although cause appeared to them for granting a new trial, if they had power to do this without the consent of the King's counsel, and it seemed to them that they had not *, but they agreed, that in debt by an informer, the Court might grant a new trial upon cause, without the consent of counsel, because there the party hath an interest.

In *trespass* between Sir *John Jackson* and *Primate*, the verdict being against *Primate*, he indicted the witnesses for perjury: which being at issue and brought to trial, Sir *John* commanded his servants to beat and imprison the witnesses who were to prove the perjury, by which means they could not attend to give evidence, whereupon the defendants were acquitted. *Primate* moved for a new trial of the perjury, which was denied, being in a criminal case, as the party once acquitted shall not be tried again. But the Court directed an *information* against *Jackson*, and he was thereupon convicted. And now it is moved in arrest of judgment, because the *information* was by way of recital, as an issue was joined,

Read v. Dawson, M. 13 Car. 2. B. R. 1 Sid. 49.

If the Court may grant a new trial where the verdict is for the King, in an information, &c. V. Sid. 153. 1 Kcb. 124. Pl. 53. 1 Jon. 165.

Rex v. Sir John Jackson, H. 15 & 16 Car. 2. B. R. 1 Lev. 124.

Q. as to new trial in a criminal case where the defendant is acquitted.

The ground of the motion was, for improper behaviour to witnesses, and preventing them from attending to give evidence.

* New trial granted without the consent of the king's counsel, *V. Smith and Frampton*, 1 L. Ray. 63. So in 3 W. and M. B. R. between the King and Queen and *Stone*, in an information for perjury, a new trial was granted to the defendant, without the consent of the King's counsel, as mentioned by Mr. *Nortbey* in *Smith v. Frampton*, 1 L. Ray. 63. Strange reasoning in the case in *Siderfen*, as if the interest a man hath in his character is not of more importance than any property whatever!

Vide ante IV

and

and it does not say positively that an issue was joined and appointed to be tried, *Ec. sed non allocatur*, it being only by way of inducement, to the substance of the information, which is for the battery and detaining the witnesses.

2. The *information* is against *Jackson*, for procuring *A. et B.* to beat and imprison the witnesses, and *Jackson* only tried, and convicted, and the others not yet tried, so *non constat* that they are guilty of the battery and imprisonment, and therefore *Jackson* cannot be guilty of the procurement, of that which does not appear to have been done. But it was resolved that he who commands is a principal and not an accessary, and he being found guilty, it shall be intended that the fact was done; and the Court imposed a fine of £ 1000 upon *Jackson*, and that he should find surety for his good behaviour for a year, before he should be discharged. But being specially committed by the Court, at the suit of the King, they ordered that he should not be charged with any action or execution during his imprisonment, without leave of the Court; and afterwards, *Primate* moved to have part of the fine towards his charges, and of this the Court would consider. In the same term in *Sir Charles Stanlie's* case, the Court would not permit him, being in prison at the suit of the King, to be charged.

I conceive now, if a prisoner is in custody at the suit of the King, the Court would give leave to charge the prisoner with civil suits, executions, *Ec.* and for bail to surrender him in discharge of themselves.

Sir John Jackson procured himself to be discharged from a large debt, upon a trial for it, at the assizes in *Cumberland*, by the perjury of *F.* and

Information
against A. for
procuring B.
& C. to commit
a trespass: he
may be con-
victed of the
procurement,
although the
others are not
convicted of the
fact.

Vide ante &
post.

A prisoner
at the suit of
the King shall
not be charged
at the suit of a
subject, without
leave of the
Court.

Court gives
the prosecutor
part of the fine.

Rex v. Fen-
wick and Holt,
M. 15 Car. 2.
B. R. 1 Sid. 153.

F. and *H.* of which perjury they were indicted, and to be tried the next assizes there; of which Sir *John Jackson* being informed, he procured the witnesses who were to give evidence against *F.* and *H.* of the perjury to be arrested for large sums, as they were going to the assizes, by which means the witnesses could not attend to give their evidence, and so *F.* and *H.* were tried, and acquitted; and upon affidavit of this practice, in *Trinity* term, a new trial was moved for, but the Court were in doubt if there should be a new trial, in case of perjury after acquittal; and if it could be, they would not grant it upon affidavit, but directed that this practice of Sir *John Jackson*, as it was a great misdemeanor, should be tried by information; and so it was at the last assizes for the same county, and the practice found; and now upon this verdict, it was often moved to have a new trial for the perjury, and it was said, that this is only a misdemeanor, as in trespass at the common law, and that there was not any danger of life; but all the Court (except *Windham, J.*) said, that they could not grant a new trial in the case of perjury, after an acquittal, inasmuch as the record of acquittal was before them; but in the case of a new trial, between party and party, there is not any record of acquittal here, for one party comes here and moves for a new trial for a misdemeanor, &c. and upon this the first *postea* is stayed, and not entered of record, and so a diversity; and although search had been made, yet no precedent could be found in this case, but where the new trial was by consent; and farther, although the mischief is great as hath been urged, yet we may not innovate the law, and they said that all the Justices at *Serjeants Inn*,
in

Where there shall not be a new trial in the case of perjury. Vide ante, and 1 Keb. 124. Pl. 33. Jon. 163. 1 Lev. 9. 10.

in *Fleet-Street*, were of their opinion *scil'*, that there cannot be any new trial in this case, but for deterring others from such contrivances, they said that they would fine Sir *John Jackson* in a large sum.

But *Windham, J.* held, that a new trial might be granted in the case of perjury, and the books are only, that the life of a man shall not be put in jeopardy twice for one crime. But in this case the punishment does not extend to life, and if there be not any authority against us in this case, I understand that we may do so for the extending of justice, that the innocent may not be punished for the guilty, especially when the way or means by which the party escapes justice, is a greater offence than the first.

1 Leon. 180.

* Qu. Pounds.
One imprisoned
for a misde-
meanor shall
not be charged
in execution,
without leave.
Noy. 1.
3 Inst. 215.
Sid. 90. 211.

Nota, In Hilary term following, Sir *John Jackson* was brought into Court, and had judgment to be fined a 1000 marks, and to be imprisoned one *month* without bail, and to find security for his good behaviour for one year.

And in this case it was resolved upon several debates, that Sir *John Jackson* should not be charged in execution, nor any other who is so committed for a misdemeanor, without leave of the Court, at the suit of any party, the same law as to putting in special bail to actions against him; and so it was said in the case of Sir *Charles Stanlie* the same term. *Vide Sid.* 159, 160.

Several cases and reports of the matter respecting Sir *John Jackson* have been given, that the reader may, if he can, understand what was determined by the Court upon the subject.

A new

A new trial was granted in perjury on the Judge's information, that it was a malicious prosecution; but it shall not be granted without such information, unless the Attorney-General or King's-counsel consent to it. *Vide ante*, p. 157, *n. et Post*.

Lander v. Elliot, Hil. Term, 3 & 4 Jac. 2. B. R. Comb. 75. New trial in perjury.

Upon an indictment for a libel, the defendant was by verdict acquitted; Mr. Attorney-General moved for a new trial, but it was denied: And the Court said, That anciently it was never done in criminal cases where defendants have been acquitted; latterly where it has been a verdict obtained by fraud or practice, as stealing away witnesses, &c. it has been done, * but never yet was done merely upon the reason that the verdict was against evidence. *Postea Mich. 10 W. 3. B. R. Per Holt, C. J.* in indictments of perjury we never do it, because the verdict is against evidence; but if you prove a trick, as no notice, &c. it is otherwise. *Vide 1 Lev. 9. 124. Ne Serra, si le def. soit acquit, alit. s'il soit convict.*

Rex v. Bear, P. 9 W. 3. B. R. 2 Salk. 646.

Indictment for a libel, defendant acquitted, and new trial denied. V. Farell. 31 & 37.

* Qu. ?

On acquittal in perjury, no new trial, tho' against evidence: Contra, where there is a trick, as no notice, &c.

See 2 Saund. 336. The defendant in error, upon an error in fact, took out a record of *nisi prius*, and proceeded to trial at the first assizes after issue joined; yet held good, and a new trial denied.

Dennis v. Dennis.

The defendant was convicted of forgery, and would have moved for a new trial, without appearing in court; insisting that this differed from a motion in arrest of judgment. But the Court held there was no difference; for the verdict fixes such a presumption of guilt, that the Court will be sure of him, before

Rex v. Gibson, E. 7 G. 2. B. R. 2 Stra. 968.

Defendant after conviction must be in court, to move for a new trial. V. 2 Stra. 844.

fore they intimate any opinion : and even when the verdict was brought in, would have committed him, had he staid in court. And the Chief Justice mentioned the cases of *Regina v. Ridpath, Pasch. 12 Ann.* and *Rex v. Lunt et Wombwell*, in perjury, where the distinction now taken was over-ruled.

Rex v. the Parish of Silvertown, H. 24 G. 2. B. R. 1 Willf. 298.

No new trial where defendants are acquitted on indictment for not repairing an highway.

Indictment for not repairing an highway, and a verdict for the parish. It was now moved for a new trial (by Mr. *Pratt*) for misdirection, or over-ruling evidence at the trial, by reason whereof the parish was unduly acquitted; *per Curiam*, This is a criminal case, and new trials are never allowed where defendant is acquitted in a criminal case. So also it is in *qui tam*'s and informations in nature of *quo warranto*'s.

Rex v. Simons a Jew, 25 & 26 G. 2. B. R. 1 Willf. 329.

New trial granted for the defendant in a criminal case, upon the report of the Judge and affidavits of the Jury that the verdict was taken contrary to their meaning, and to the Judge's direction in point of law.

The defendant was indicted for putting into the pocket of one *Ashley*, three *ducats*, with at malicious intent to charge him with felony, and was tried before Mr. Justice *Foster*, at the last Assizes for the county of *Essex*, and found guilty generally as to all the counts in the indictment.

The Court was moved for a new trial upon the affidavits of all the twelve jurymen, " that they only intended to find the defendant " guilty of putting the *ducats* into *Ashley*'s " pocket, and did not intend, or understand, " that they had found him guilty of putting " the *ducats* into his pocket, with an intent to " charge him with felony; and *Dodson* the foreman swears, that he declared at the bar to " the Court when they brought in their verdict, that they found the defendant guilty of " putting

" putting the ducats in Asbley's pocket, but without any intent."

Mr. Justice *Foster* reported, That after the evidence was gone through and summed up, the Jury departed from the bar to consider of their verdict, and gave a private verdict at his lodgings that the defendant was guilty; the next morning they all appeared in court at the bar, and being asked if they stood by their former verdict, they answered they found the defendant guilty. That Mr. Justice *Foster* then told them that there were *four counts* in the indictment, and that the evidence for the king was only applicable to the *third*, which charged the defendant with maliciously putting three *ducats* into *Asbley's* pocket with an *intent* to charge him with *felony*; and told them that *the intent* was the principal thing to be considered by them, and that if they believed the defendant did not put the *ducats* into *Asbley's* pocket *with an intent to charge him with felony*, they must acquit him, whereupon the foreman at the bar said, "*We find him guilty of putting the ducats into his pocket without any intent.*" But by some mistake, or misapprehension of the Court, or the Jury, or of both, a general *verdict* was taken that the defendant was *guilty*.

After this report, the *Jury*, by further affidavits, swear that there was a very great noise in court, and that when the Judge directed them to acquit the defendant if they believed he did not put the *ducats* into *Asbley's* pocket *with an intent to charge him with felony*, they did not hear or understand him.

This question having been debated by five or six counsel on each side, the Court gave their opinion for a new trial.

LEE, *Chief Justice*.—There is no doubt but a *new trial* may be granted in a *criminal* case; and the true reason for granting *new trials*, is for the obtaining of justice; but to grant *them* upon the *affidavits of jurymen only*, must be admitted to be of dangerous consequence. It appears to me from the *report of my brother*, and the *affidavits of Dodson the foreman*, that this *verdict* was taken by a mistake, for he swears that he declared in court, “that they “did not find the defendant guilty of any intent,” and therefore this is not granting a *new trial* upon any *after thought* of the *Jury*, but upon what the *foreman Dodson* declared at the bar when they gave their verdict. I am very clear in my opinion there ought to be a *new trial*, and the rather, as this is a *criminal* matter.

WRIGHT, *Justice*.—*New trials* are generally supposed to be more ancient than appears in the books, for want of reporters when they first began to be granted; every case of this kind must depend upon its particular circumstances: the *Jury*, every man of them, come here and tell us that they were not understood, for that they declared at the bar they did not find the defendant guilty of *any intent*. My *brother reports*, that he told them if they did not believe the *intent*, they must acquit him; the *Jury* now swear “*they did not hear him*;” therefore I am of opinion it is a verdict *mis-entered*, contrary to the declaration of the *foreman*, not contradicted by any of the rest, at the time it was spoken at the bar; and that it is most plainly *no after-thought*, so that we may keep clear of the danger of granting *new trials* merely upon the *affidavits of jurymen*: I think this man has been convicted contrary to the

judgment of his peers, that he has not had *Judicium Parium*, and that we are bound to grant a *new trial*; and this being a *criminal* case is more to be favoured as to a new trial, than if it had been a *civil* case.

DENISON, *Justice*.—The Court will be very cautious how they grant *new trials* upon the *affidavits of jurymen*, because it would be of very dangerous tendency; but in this particular case, which partly depends upon my *brother's report*, and partly upon the *affidavits of all the Jurymen*, I am very well satisfied there ought to be a *new trial*, because it appears both by the *report* and *affidavits* that this *verdict* ought not to stand, and that the *Jury* were mistaken in giving a *verdict* contrary to the direction of the Judge; and *that* is what I principally go upon, that it is a *verdict contrary to the direction of the Judge in a point of law*; one of the Jury said, "*the defendant had no intent*," then the Judge said, "*You must acquit him*;" some of the Jury swear they did not *bear*, others, that they did not *understand* the Judge.

FOSTER, *Justice*.—I am of the same opinion. I gave no direction at all in *point of fact*, only of law, "That if they did not believe the *intent*, they must acquit the defendant," they told me "they did not believe any *intention*;" this is a *verdict contrary to law*.

New trial granted upon payment of costs.

The defendant was tried before PERRY, Baron, at the Spring Assizes, in 1777, at Gloucester, on an indictment for perjury. The indictment was found by the Grand Jury for the county of Gloucester. It stated, That, on the trial of an action brought in the King's Bench, in which the *venue* was in the county of Gloucester,

The King v. Gough. T. 21 G. 3. B. R. Doug. 760.

Perjury being committed in the Booth-hall, within the limits of the city of Gloucester, which is a coun-

ty in itself, on the trial of a cause before a jury of the county at large, the indictment may be found and tried by juries of the county at large.

The king cannot by charter authorize the trial of crimes out of the county where they were committed.

A new trial may be granted at any time before judgment.

Gloucester, between Lord *Ducie* and Doctor *Bosworth*, at the Assizes holden at *Gloucester* for the said county of *Gloucester*, the defendant was produced as a witness, and falsely, wilfully, corruptly and maliciously, did, among other things, depose in substance as follows, &c. whereas in truth, &c. and so the jurors aforesaid, &c. say that the defendant, &c. at the said Assizes held at the said city of *Gloucester*, in his evidence, committed false, wilful, and corrupt perjury. Then another act of perjury was laid on the same occasion, and at the same time and place. The record then stated, after the appearance of the defendant, and a plea of not guilty, that the sheriff of the said county of *Gloucester* was commanded to summon a jury of the said county of *Gloucester* for the next Assizes and General Session of Oyer and Terminer to be holden for the said county of *Gloucester*, and that, thereupon, such proceedings were had, that, at the Assizes and General Session of Oyer and Terminer holden at *Gloucester*, for the said county of *Gloucester*, on the 12th of *March*, 17 *Geo.* 3. a jury impanelled and returned by the sheriff of the said county of *Gloucester*, was chosen, tried, and sworn to try the prisoner.

Upon the trial, a *special verdict* was found, which stated: 1. A charter to the burghesses of *Gloucester* in the first year of *Ric.* 3. whereby that king granted to them, and their successors, that the town of *Gloucester* should be, " unus
" integer comitatus per se corporatus, distinctus,
" et penitus separatus, a dicto comitatu Glou-
" cestriensi in perpetuum, et non parcellum ip-
" sus comitatus Gloucestriensis; et quod idem
" comitatus sic corporatus, et a dicto comitatu
" Gloucestriensi distinctus et separatus, comi-
" tatus

" *tatus ville Gloucestrie pro perpetuo nomine-*
 " *tur*; salvis tamen et reservatis nobis, et hæ-
 " redibus nostris, quod justitarii ad assizas in
 " comitatu *Gloucestriensi* capiendas assignandi,
 " justitarii ad goalam in comitatu *Gloucestri-*
 " *ensi* liberandam assignandi, nec non justiti-
 " arii ad pacem in dicto comitatu *Gloucestriensi*
 " conservandam assignandi, in tenendas sessiones
 " suas, ac etiam vicecomites comitatus nostri
 " *Gloucestriensis*, in tenendos, comitatus suos,
 " liberè possint, et eorum quilibet possit, in-
 " gredi villam *prædictam*, et easdem sessiones
 " et comitatus tenere de quibuscunque rebus
 " et materiis *extra dictum comitatum ville*
 " *Gloucestrie et infra comitatum Gloucestri-*
 " *ensem* emergentibus, sicut ante hæc tem-
 " pora tenere consueverunt presenti concef-
 " sione nostra in aliquo non obstante." The
 charter then declared, that the bailiffs of the
 town of *Gloucester*, should be sheriffs of the
 county of the town; that they should hold
 county courts from month to month; that
 they should exercise all the same powers, &c.
 belonging to the office of sheriff, within the
 limits of the town, as other sheriffs exercise in
 their bailiwicks; that all writs, &c. which
 would have been directed to the sheriff of the
 county, if the town had not been made a
 county in itself, should be directed to them;
 and that no other sheriff or his bailiffs should
 enter the town to do any thing belonging to
 the office of a sheriff, except the sheriff of the
 county of *Gloucester* to hold his county courts
 as aforesaid: 2. That this charter had been
 accepted: 3. That it had been confirmed by a
 charter of 5 Hen. 7. and declared to be by au-
 thority of parliament: 4. A charter in the 33d
 year of Hen. 8. under the privy seal, and declared

to be by the authority of parliament, whereby Hen. 8. incorporated the burgesſes of *Glouceſter*, by the name of the Mayor and Burgeſſes of the city of *Glouceſter* and city of the county of *Glouceſter*, and made it a city, and confirmed to the ſaid city the former grants making it a county in itſelf: 5. That this charter was accepted: 6. A charter in the 24th year of *Car.* 2. confirming all former privileges contained in prior charters which had been ſurrendered; and containing a claufe in effect the ſame and nearly in the ſame words with that above ſet forth from the charter of *Ric.* 3: 7. That this charter of *Car.* 2. was accepted: 8. That, during all the time aforeſaid commiſſions of *niſi prius*, aſſize, oyer and terminer, and general gaol delivery, had been, from time to time, granted to divers juſtices, to hear and determine, try and adjudge upon the ſeveral matters and things to ſuch commiſſions belonging, and ariſing, in the ſaid city of *Glouceſter*, and to deliver the gaols of the ſaid city; and that other, and ſeparate commiſſions of the ſame fort, had, from time to time, during all the time aforeſaid, been granted to divers juſtices, to try and determine, &c. upon the ſeveral matters and things to ſuch laſt-mentioned commiſſions belonging, and ariſing in the ſaid county of *Glouceſter*, and to deliver the gaols of the ſaid county: 9. That the commiſſions both for the city and the county, had been executed at a place in the ſaid city of *Glouceſter* called the *Booth Hall*: 10. That, during all the time aforeſaid, the jurors for the city had enquired and made preſentment of ſuch matters and things belonging and given in charge to the jurors for the city, and ariſing in the ſaid city of *Glouceſter* in the ſaid place called the *Booth-ball*,

ball, and that such matters and things so presented by the said jurors, when tried, had been tried by a jury of the said *city of Gloucester*:

11. That the grand and petty juries for the county had exercised the same jurisdiction as to matters arising within the county: 12. That, during all the time aforesaid, the sessions of the peace for the county had been held in the *Booth-hall*: 13. That the issue in the indictment mentioned had been tried by a jury of the county in the *Booth-hall*: 14. That the defendant, being then and there sworn, did upon his oath, in the said place called the *Booth-hall*, commit wilful and corrupt perjury, in the several matters charged in the indictment.

The objection to this indictment was, that the offence had been committed within *the county of the city*, and that the juries of the county at large had no jurisdiction to find or try an indictment for any crime not committed *in the county at large*.

It came on to be argued, on *Wednesday*, the 23d of *May*, by *Bearcroft* for the prosecution, and *Baldwin* for the defendant.

The Court directed *Baldwin* to begin.

He said, the general position was clear, that offenders can only be indicted and tried by juries of that county in which the offence was committed. This nicety was formerly carried so far, that, 'till the statute of *Edw. 6.* (a) if a person received a mortal wound in one county, and died in another, the crime could not be tried in either. 2 *Hale's Pl. Cr.* 163. 2 *Hawk.* p. 220. § 34, 35, 36. 4 *Black. Com.* 303. *Stedman's Case*, *Cro. Eliz.* 137. *Richard Thomas's Case*, *ibid.* (in which, the indictment being that the defendant at the Castle of *Lincoln* falsely deposed, without shewing in what county, he

was

(a)
2 et 3 *Edw.*
6. c. 24. Vide
1 *Hawk. Pl. Cr.*
c. 31. § 13.

was discharged) and 1 *Salk.* 288. Such being the general principle, the counsel for the prosecutor must endeavour to distinguish this case by some of the clauses in the charters found by the special verdict. They will probably rely on the clause in the charter of *Ric.* 3. But by that clause, the justices for the county at large are only authorised to enter into the town, and to enquire of things there, which had arisen out of the county of the town. The true meaning of this charter was, to give the use of the *Booth-hall* to the judges and juries for the county at large, and to authorise their proceedings there, relative to matters within their jurisdiction. At the *Old Bailey*, which is within the city of *London*, juries for the county of *Middlesex* sit to try offences committed in that county; but, when perjury has been committed there on a trial before a *Middlesex* jury, such perjury is never tried by a jury of the county of *Middlesex*, but by one of the city of *London*. In the celebrated case of *Elizabeth Canning*, after a prosecution at the *Old Bailey*, for a crime committed in *Middlesex*, the indictment of the witnesses for perjury was laid in the city. In like manner on a trial at bar in *Westminster Hall*, from *Yorkshire* for example, though the cause is tried by a *Yorkshire* jury, if perjury be committed by a witness, he must be indicted and tried by a *Middlesex* jury. In 2 *Hawk. c. 5. § 19*, where this case of *Gloucester* is mentioned, and in the authorities there cited, all that is meant is, that juries of the county sitting in the city, may find and try offences committed in the county. The case in *Popham*, 16. (also reported in *Ander-son*, 291) which will probably be mentioned on the other side, seems to be in favour of the defendant,

defendant, for *the decision* only was, that the justices of assize and gaol delivery might sit in the city for things which happened within the county; and in a note at the end of the case it is said, that, by the commission for the county, a thing which happens in the town cannot be determined, albeit it be felony committed in the Hall during the sessions (a). Considerable pains have been taken to enquire if there is any precedent, or instance, in the city of *Gloucester*, like the present case, and none has been found. No inconvenience will arise if the Court should hold that this indictment cannot be supported, because the verdict states, that there are grand juries in the city, who may find offences committed in the *Booth-hall*.

(a)
Poph. 17.

Bearcroft, for the prosecution, argued, that the perjury having been committed on the trial of a county cause, it must of necessity be taken, that, at that time, the spot where the offence took place was part of the county at large. It is no uncommon thing for the same spot to be considered, for different purposes, as being within different jurisdictions. The space between the high and low water marks, when dry is within the jurisdiction of the sheriff, but when it is overflowed, the sheriff and admiralty have *divisum imperium* over it (1). Before the charter of *Ric. 3.* this spot was clearly part of the county at large. By the statute of 6 *Ric. 2. cap. 5.* the justices of assize and gaol delivery are to sit in the county towns of the different counties; by 13 *Edw. 1. cap. 30.* trials at *nisi prius* are to be held before the judges of assize; and the authority of the judge at *nisi prius* is by the commission of assize, as is laid down by Lord Holt (*Salk.* 454). By giving authority to the justices for
the

(1)
Vid. 5 Co. 107.

the county at large, to try county causes within the limits of the town, the charter of *Ric. 3.* made the place where they sat part of the county at large for that purpose. The trial on which the perjury was committed was at *nisi prius*. The whole proceedings were void, unless the *Booth-hall* be considered as being, at that time, part of the county. All the judges in Queen *Elizabeth's* time, in the case reported by *Popham*, agreed, that they might sit in the city for county causes, and that the king might, in making a separate county, save and except part of the jurisdiction within it, which the county from which it was taken had in it before. By the saving in the charter of *Ric. 3.* all that appertains to, and is connected with, the execution of commissions in the county is necessarily saved. It is true, that a felony committed in the Hall during the assizes for the county, must be tried in the city, because such offence is entirely unconnected with the execution of the commissions for the county. The case in *Popham* is more materially reported by *Anderson*, and he states, that the Judges were of opinion, that it was the intent of the charter, that the town of *Gloucester* should continue, for the purposes mentioned in the exception, to be part of the county at large. It may be true, that indictments for perjury before *Middlesex* juries at the *Old Bailey*, are laid and tried in *London*, but no inference can be drawn from thence with regard to *Gloucester*. There may be some particular provisions for that purpose in the charters of *London*, which charters are confirmed by act of parliament. Perhaps the prosecution in the present case might be in either county. In point of law, the *Booth-hall* was, at the time,

time, in the county at large, and, in point of fact, and local situation, in the county of the city, and, therefore, the offence might be said to have been committed either in the one or the other.

LORD MANSFIELD. — It seems to me, as at present advised, to be the better opinion, that the crime might be laid in either county; but the question now before us is, whether it could be laid in the county at large? The doubt before the Judges, in the case in *Popham*, was as Mr. *Baldwin* states it (*viz.* whether the judges could sit in the city to try matters arising in the county at large)? But it is material to see how it was solved. In the time of *Ric. 3.* the town was part of the county at large. By his charter it was made a distinct county, but with an exception, that the judges for the county at large might still try causes there. The king cannot by his charter give judges a power to try in one county offences committed in another. That was admitted in the case before the Judges, as reported by *Anderson*. But, it was answered, that he had continued the city as part of the county at large. If this is so, the cause in which the perjury was committed, was tried in the county at large, and the witness was examined, and the crime committed in the county at large. This distinguishes the present case from that of the *Old Bailey*, which struck me strongly at first. The city of *London* has many charters and customs confirmed by act of parliament, and the custom of trying offences committed in *Middlesex*, at the *Old Bailey*, has probably been confirmed by act of parliament; for otherwise it would be void.

WILLES, *Justice*. — If it had not been for the case of the *Old Bailey*, I should have had no doubt;

doubt; but, with regard to that, there is no occasion to suppose a grant or custom confirmed by act of parliament, because the whole Court seems to think, that the indictment may be laid either way, and, at the *Old Bailey*, the usage has been to lay the indictment in the city.

ASHHURST, *Justice*.—No argument can be drawn from the practice at the *Old Bailey*, unless we knew more exactly how the case stands; there may be an act of parliament enabling the judges to try matters there, which arise in the county of *Middlesex*. Here, I think, the indictment would have been good either way. The king cannot, without an act of parliament, give the judges a power to try in one county, facts arising in another. Therefore, the meaning of the charter must have been, to continue the town as part of the county at large, for the purpose of trying county causes.

BULLER, *Justice*.—I am of the same opinion. There is no way of supporting the judicial proceedings at *Gloucester* from the time of *Ric. 3.* but by considering them as having been had in the county at large; because I take the law to be clearly as my lord and my brothers have stated it. We have no authority to compel a jury to come, or to administer an oath, out of the county where the matter arises. Therefore, the meaning of the charter must have been, to leave the place as part of the county at large. I am very strongly inclined to think the indictment might be laid in either, but, if there is a difference, I think this the most proper way.

The defendant was this day brought up for judgment, when *Buller, Justice*, read the re-

port of the evidence, and *Dunning* was heard on his behalf; after which, the Court observed, that, from the state of the evidence, the conviction appeared extraordinary, and hinted that a new trial would be proper.

Dunning said, he should have made a motion for that purpose, if he had thought it was competent, after such a long interval of time since the conviction. Upon this, Lord MANSFIELD declared, that it was still competent, because the report of the evidence coming regularly now before the Court, if enough appeared to raise an inclination in them to think the defendant ought not to have been convicted, they could only grant a new trial, or postpone for ever pronouncing judgment; for that there would be an absurdity in a judgment on a conviction for perjury, where a fine of a shilling should be imposed as the punishment.

A new trial was awarded (a).

(a)
Birt v. Bar-
low, E. 19 Geo.
3. Post IX. (16.)

IX. Of other Matters respecting new Trials, &c.

(13.) *Of Defendant's entering up Judgment against himself, where Plaintiff (who had recovered a Verdict with small Damages) would not enter up Judgment.*

Petty v.
Hockley, E.
20 Jac. B. R.
Palm. 281.

Dy. 194.

BAXDAL of *Lincoln's-Inn*, moved, that inasmuch as the plaintiff had obtained a verdict against the defendant, and would not enter his judgment (because he was desirous of bringing trespass for the same trespass) that the defendant might enter the judgment against himself upon this verdict; so that he might have error, or attain; and cited a precedent, *Hil. 6 Jac. B. R.* between *Hoggsflesh* and *Humbers*, in covenant where the defendant was suffered to enter judgment for the cause aforesaid against himself, where the plaintiff would not enter it, on account of the smallness of the damages; and it was ruled accordingly in this case by *Dodd* and *Chamberlaine*.

IX. Of other Matters respecting new Trials, &c.

(14.) *Of a Verdict right in Part, and wrong in Part, and of one Defendant being found guilty, and another acquitted.*

SATUR, a bankrupt, at the time of his going off, left some plate with his wife, who in order to raise money upon it, delivered it to her servant, who went along with the defendant to the door of Mr. *Woodward* the banker, and there the defendant took the plate into his hands, and went into the shop and pawned it in his own name, gave his own note to re-pay the money, and immediately upon the receipt of it, went back to the bankrupt's wife, and delivered the money to her. In trover for the plate, the Jury (considering the defendant acted only as a friend, and that it would be hard to punish him) found a verdict for the defendant. But upon application to the Court, a new trial was granted, upon the foot of its being an actual conversion in the defendant, notwithstanding he did not apply the money to his own use. And upon a second trial the plaintiffs obtained a verdict for the value of the plate.

Parker et al. v. Godin. M. 2 Geo. 2. B. R. 2 Stra. 813.

What meddling with the effects of a bankrupt is a conversion.

N. B. A difficulty arose upon the motion for a new trial, which was this. There were

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other

other things besides plate in the declaration, and as to them the verdict *pro def'* was right; and yet a new trial must be granted upon the whole. But on consideration, the Court held, that could be no reason to refuse a new trial, for if the merits as to those other things were with the defendant, it would be found for him as to them.

But it was agreed on all hands, that if one defendant be acquitted, and another found guilty, that defendant can have no new trial. *Strange pro quer'.*

Sed qu.?

In the case of *Edic* and another *v.* the *East India Company*, *ante V.* there were two counts in assumpsit, upon two bills of exchange, the Jury found for the plaintiff on the first count, which was right—For the defendant, upon the second, which was wrong, and the verdict was set aside generally.

IX. Of other Matters respecting new Trials, &c.

(15.) *Where the Court is divided on Motion for a new Trial.*

AT *nisi prius* plaintiff had a verdict, and on a motion for a new trial, the Court were divided in opinion; and no rule being made, plaintiff was at liberty to sign final judgment.—*Chapple* for plaintiff; *Eyre* for defendant.

Cartledge v. Eyles, Bart. Hil. 10 Geo. 2. Barnes, 442.

Court divided on motion for new trial: plaintiff had judgment.

On a case made upon a point reserved at the trial, where a verdict was found for plaintiff, subject to the opinion of the Court; Mr. Justice *Abney* and Mr. Justice *Birch* delivered their opinions, that though plaintiff cannot recover the value of Bank notes of which he was robbed to the value of £.960, for want of a sufficient description thereof in his advertisement, in the *London Gazette*, yet he ought to recover for what is sufficiently described, (*viz.*) his watch and money, value £.10, the words of the late act being to be taken distributively. Lord Chief Justice and Mr. Justice *Burnett* were of opinion, that nothing can be recovered. The words of the late act are, That plaintiff shall not maintain his action, unless he describes the robbers, &c. together with the goods and effects of which he was robbed: twenty days before the advertisement are given to the person robbed, to recollect a particular description. The party robbed ought to discover,

Chandler v. The hundred of Sunning, on the statute of Hue and Cry, H. 22 Geo. 2. Barnes, 453.

Plaintiff cannot recover for notes he does not sufficiently describe, but for what is sufficiently described he may recover.

as well as he can, all the goods he lost, to give light to the Hundred to take the robbers. The person robbed gets nothing by the taking; the public indeed are benefited. A person robbed of a large sum of money, probably cannot farther describe it than that it was in gold and silver; but perhaps can describe other particular things then lost; which he ought to do. The description of Bank notes by numbers, dates, and sums (which in this case were omitted) are highly useful for discovery. No two have the same marks. If plaintiff, at the time of his advertisement, had not known the numbers, &c. but recollected them afterwards, the action would lie. But on the trial he acknowledged that he knew them, and they were all particularly entered in his pocket-book at the time of the advertisement. The Court being divided, no judgment could be entered on the verdict.

IX. Of other Matters respecting new Trials, &c.

(16.) Of setting aside Nonsuits, and Nonpros's.

IN Northumberland at the assizes, a plaintiff in *ejectment* was called and nonsuited, and this entered upon the record before the *venire*, or *distringas*, &c. was put in, and this appeared by the *postea* now produced, for it is only a nonsuit indorsed upon it, and the justices of *nisi prius* had not power to nonsuit, for their power is by the *Habeas Corpora*, and for this cause the Court discharged the nonsuit, and gave leave to the party to proceed again.

Thompson v. Hudsbet, M. 15 Car. 2. B. R. 1 Sid. 164.

Nonsuit at nisi prius before venire or distringas put in, discharged.

An action of *indebitatus assumpsit*, for money received *per* the defendant, to the plaintiff's use.

Temple v. Welds, P. 1 G. 1. B. R. Lucas, or 10 Mod. 315.

Upon evidence, the case came out thus: The plaintiff and another laid a wager; the defendant held stakes; the plaintiff brought evidence, that he had won the wager. *Blencowe* that tried the cause, being of opinion, that the plaintiff had mistaken his action; because this money could not at the time of the action brought, be said to be money received to the plaintiff's use; since the defendant was not to pay the money, until the wager was *proved* to be won,—The plaintiff was nonsuited.

Assumpsit for money had and received against a stake-holder.

The plaintiff now moved to set aside the nonsuit ; because occasioned by the Judge's mistaking the law.

Court.—Action well brought ; for upon the wager won, the money was actually the plaintiff's, though he could not receive it before the fact was made appear.—*Sed adjournatur.*

1757.
Bennett qui
tam, &c. v.
Smith. M. 31
G. 2. B. R.
1 Burr. 401.
A regular
non prof.
against a com-
mon informer,
refused to be
set aside.

The Court refused to set aside a non prof. regularly obtained by the defendant, against the plaintiff, who was only a common informer, (who sued for a penalty of £. 10,000 upon the statute of usury) though the plaintiff offered to pay the costs of setting it aside.

For, though Lord MANSFIELD seemed to think that the case might, perhaps, have borne a different consideration, in case the plaintiff had been the party REALLY INJURED, and had sued in order to come at justice and reparation, for such real injury ; yet not only his Lordship himself, but

* Mr. Justice
Forster was not
in court.

The whole Court (now * present) were clear and unanimous, that where a MERE common informer, who sued for PUNISHMENT only, had been guilty of a slip or mistake which put him out of court, and intitled the defendant to enter a non prof. against him, they would not exercise their discretionary power, in setting aside this non prof. thus regularly obtained, and restoring the mere common informer to an opportunity of proceeding for the sake of punishment only. And they distinguished the present case, from cases of AMENDMENT ; which indeed the Court would not scruple to make, even in cases of qui tam actions, where there was any thing to amend by ; and which they had frequently done, in some instances that were mentioned, or at least hinted at, as, in particular,

particular, the giving leave to *change the county* in a *qui tam* action, on Mr. Norton's motion, not many terms ago.

The COURT refused to set aside a nonsuit voluntarily suffered by the plaintiff, and to give him leave to reply *de novo*. He had replied, "that the *cause of action* arose within six years:" which fact he could not prove. He wanted, therefore, to set aside the nonsuit, and reply *de novo*: which, if he had succeeded in, he would have replied, "that the *writ of latitat* issued within the six years." But

The COURT said, that that would make a quite new question; which the plaintiff had before pretermitted, and had put the issue upon quite another foot, and upon a point which he could not establish.

Rule discharged.

Mr. *Dunning* was for the motion: Mr. *Wallace* against it.

Vide Robinson v. Raley, and Alder v. Chipp, post IX. (21.)

Trover for a great many goods, to the value of £.700. Upon not guilty pleaded, this cause was tried at the last assizes for the county of *Norfolk*, before Lord Chief Baron *Parker*. Whereupon it appeared on the plaintiff's evidence, by seven witnesses, that *Thickpenny* was an innkeeper; and that he not only sold liquors to his guests (*hospitantibus*) in his inn, but also sold divers quantities of wine, rum, and brandy, by four, five, and six gallons at a time, to several persons living two and three miles distant from his inn, for them to retail out and sell again, and had done thus for some years; whereupon it was insisted by the coun-

Hutchinson
Executrix, v.
Brice, H. 11
G. 3. B. R.
5 Burr. 2692.

Court will not set aside a nonsuit voluntarily suffered, and give plaintiff leave to reply *de novo*, such a replication as will make a new question.

Buscall and others, assignees of *Thickpenny*, a bankrupt, v. *Hogg, M. 11*
Geo. 3. C. B.
3 Wils. 146.

A new trial granted to plaintiff, without costs, he having been improperly nonsuited. The question, as to the trading of an innkeeper.

fel for the plaintiffs, at the trial, that this sort of trading by an innkeeper, made him liable to a commission of bankrupt: but the *Chief Baron*, without hearing any other evidence, was of a different opinion; and ordered the plaintiffs to be nonsuited, with leave to move the Court for a new trial, without costs, in case he was mistaken in his opinion.

And now, upon the motion of Serjeants *Whitaker* and *Forster*, to set aside the nonsuit, the Court was clear of opinion, that the plaintiff ought not to have been called, but the matter ought to have been more fully sifted and gone into at the trial; that it not appearing to the Court here, what proportion *Thickpenny's* trade in his inn bore to his trading abroad and out of doors, they could not judge whether he was liable to be a bankrupt or not; and therefore they set aside the *nonsuit*, and granted a new trial without costs.

Nota. It was said by *Wilmot*, Chief Justice, that if *Thickpenny's* trade and profits in his inn was much larger than his trade and profits abroad out of the inn, he should incline to think that he was not * liable to be a *bankrupt*. If it should come out in evidence that *Thickpenny* got £. 600 *per annum* in his inn, and not 600 *s. per annum* by sending out and selling liquors abroad; he seemed clear in opinion, that he could not be a *bankrupt*. However, as there was general evidence that he was a trader out of his inn, the plaintiffs ought not to have been nonsuited.

* Sed qu. if later determinations are not contra? And qu. farther, which are the most consistent and agreeable to law?

Rackham v. Jessup & Thomson, M. 13 G. 3. C. B. 3 Wils. 352. Plaintiff claiming a right to cut rushes on a

The plaintiff *Rackham* being possessed of a small tenement or cottage at *Theberton*, in the county of *Suffolk*, and an inhabitant there, and, as such, claiming a right to cut down rushes, (without

(without stint as to quantity) on a certain waste or common there, called *Theberton Common* or *Home Common*, and to take and carry away the same for his own use; employed *Rudd* and *Farrow* as his servants for hire, to cut down rushes for him there; who accordingly did cut down and mow about five or six loads of rushes for the plaintiff; which rushes so cut down for the plaintiff's use, and lying and being upon the waste or common, the defendants took, and with carts and carriages, carried away the same, and converted them to their own use; whereupon the plaintiff brought *trover* against the defendants, who pleaded not guilty; and issue being joined, this cause came on to be tried before my brother *Whitaker*, at the last summer-assizes held for the county of *Suffolk*, when the plaintiff proved he was an inhabitant of *Theberton*, and that as such, claiming a right to cut and take away rushes on *Theberton Common*, he, by his servants, cut down five or six loads of rushes, and that the defendants took and carried away and converted the same to their own use; whereupon my learned brother, being of opinion that the evidence given for the plaintiff was not sufficient to support this action, was pleased to order him to be nonsuited upon the merits, without hearing counsel, or any evidence for the defendants.

And in this term, upon producing an affidavit of the facts above, I moved for, and obtained a rule upon the defendants, to shew cause why the nonsuit should not be set aside, and why there should not be a new trial, for that the plaintiff had given evidence of his property in the rushes, and of a conversion by the defendants, and that my brother *Whitaker* ought to have left it to the Jury; and that he might make his report to Mr. Justice *Nares*,

common, cuts 5 or 6 loads, which defendants carry away, *trover* lies. Plaintiff nonsuited by the Judge upon a supposition that he had not sufficient property to maintain the action. The nonsuit set aside.

Plaintiff at the trial proved his claim of right to cut rushes, &c. but the Judge nonsuited him without hearing the defendants.

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in order for him to state the same to the Court, which, at another day, he accordingly did, as follows :

The report of
the Judge.

Mr. Justice *Nares*.—My brother *Whitaker* reports, that this is an action of *trover* for six loads of rushes, which, upon the general issue, came on to be tried before him at the last assizes for the county of *Suffolk*, when the plaintiff called several witnesses in order to support and maintain this action.

The first witness was *John Rackham*, who swore that the plaintiff rented a small tenement or cottage at *Theberton*; that about a year ago he went to help the plaintiff to mow rushes upon the common called *Home-Common*; but these (says my brother *Whitaker*) I understand not to be the rushes in question.

That — *Rudd* and — *Farrow* mowed the rushes in question for the plaintiff, about five or six loads, which were all about the value of ten shillings a load. He further said, upon cross examination, that the rushes were mowed in the night, and that his uncle (meaning the plaintiff) kept a hog, but no other stock upon his tenement.

The second witness was *Henry Scarlet*, who proved that the defendants *Jessup* and *Thomson*, who were farmers, having or claiming some right of common upon the place where the rushes were cut, came with their carts, and carried away the rushes which had been cut down for the plaintiff by *Rudd* and *Farrow*, and that all poor people had a right to cut rushes. That this was all the evidence upon the fact.

The third witness was *John King*, who swore to right of common upon the place in question, and that any one may cut rushes from
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the common without stint at any time, as well as every body in the parish; that every body in the world may cut rushes on the common.

The fourth witness was *John Woolnoth*, who swore to the same effect, that every one cut what rushes he thought fit, and sold them to whom he pleased.

The fifth and sixth witnesses were *Stephen Goodwin* and *William Foster*, who swore to the same general right of common in every body to cut rushes on the common.

Upon my asking the plaintiff's counsel if they had any more evidence upon any other matter, they said they had several more witnesses, but all to the same purport with the last.

Upon which, I thought the plaintiff had not made out a case proper to be left to the Jury, because I conceived that in this action, the plaintiff ought to make a title by direct or presumptive evidence.

There being no direct evidence, the witnesses who spoke to the possession of the rushes, proved it was either obtained by *stealth*, or under a pretence of right of common, which I thought was illegal and void, upon which the plaintiff was nonsuited. This is the report of my brother *Whitaker verbatim*.

Upon this report being made to the Court, Serjeant *Forster* for the defendants shewed cause why the nonsuit ought not to be set aside, by insisting that the plaintiff had not proved that he had any legal property in the rushes, for that it appeared by the report, the plaintiff had caused them to be moved down, and cut in the night-time, and that the plaintiff obtained the rushes by *stealth*, or under pretence
of

of a right of common, which Serjeant *Whitaker*, before whom the cause was tried, thought was illegal and void ; and therefore nonsuited the plaintiff very properly, he having proved no *legal* property in the rushes.

Serjeant *Wilson* for the plaintiff, in support of the rule to set aside this nonsuit, insisted that it appeared by the report, that sufficient evidence was given on the behalf of the plaintiff at the trial to support this action ; it being proved that he was an *occupier* of a tenement in *Theberton*, and (as such occupier) had, or claimed to have a right to cut and take away rushes from and off this common, and that the plaintiff by his servants cut the rushes in the declaration, and the defendants afterwards took and carried them away ; this he insisted was such evidence of property in the plaintiff, and of conversion by the defendants, (who appear to be mere strangers) that the defendants, if they had any legal defence, ought to have made it at the trial, and the issue ought to have been left to the Jury, for their verdict.

It was further said on behalf of the plaintiff, that supposing, for argument's sake, he had not any lawful right to cut rushes upon the common ; yet as he claimed such right, as an inhabitant of *Theberton*, and gave some evidence thereof at the trial, *that* was sufficient to put the defendants upon their defence, and to have shewn or justified by evidence, what right they had to take and carry away the rushes in question, for the plaintiff claiming a right to cut rushes, had gained a property therein by cutting the same, sufficient to have put the defendants upon shewing that they had a better property therein ; but they not having

shewn

shewn any right or property at all to the rushes, wrongfully took them away; and the plaintiff has been improperly nonsuited.

The case of *Woodson versus Newton*, 2 *Str.* 777. is something like this case; *that* was trespass for taking and dispersing a load of *fern-ashes*: the defendant pleaded that he was an occupier of land in *A.* the tenants whereof had right of common, and cutting *fern* in the *locus in quo*, and that the plaintiff came and wrongfully cut *fern* and burnt it, whereupon the defendant came and scattered it about, *prout ei bene licuit*, demurrer *inde*.—*Strange* for the defendant cited 1 *Roll. Abr.* 405. *pl.* 5. that a commoner may justify taking the cattle of a stranger *damage feasant*, or abate hedges, 9 *Rep.* 112. b. 2 *Mod.* 65. and the difference is where it is the act of the lord, or the act of a stranger. *Sed per totam Curiam contra*, for if the plaintiff did him any damage, he has his action, but after the plaintiff had burnt the fern, and thereby converted it to his own use, the commoner has no right to come and disperse it; and judgment was given for the plaintiff; so in the case at bar, after the plaintiff had cut the rushes, they were his own property, and the defendants have not, by evidence, or pleading, shewn any right to come and take and carry them away. The case at bar, indeed, is an action upon the case in *trover*, and the case cited from *Str.* 777. is in trespass; but there are many cases where a man may have an action of *trover* or *trespass* at his election; as if one takes my goods by wrong and converts them to his own use, I can have *trover* or *trespass* against him, and shall recover damages in either of those actions.

A commoner cannot justify dispersing the ashes of fern cut and burnt by a stranger (the plaintiff) for, after plaintiff had burnt the fern, he had a property therein.

So

So if a man have wreck of the sea by prescription, or by the king's grant, if goods be wrecked upon his lands, and another taketh them away, he who hath the wreck shall have an action of trespass *quare vi et armis* for thus taking away, without seizure thereof *before*, *F. N. B.* 91. *D.* but in the very same case he might have had *trover* for the goods; and so was the case of *Biddulph*, Esq. v. *Ather* in *C. B. Trin.* 28 & 29 *Geo.* 2. *Wilson* 23. The plaintiff was lord of the manor of *Lancing* in the county of *Sussex*; and being so, was intitled by prescription to wreck of the sea thrown upon that manor, and a *sloop* being wrecked and thrown upon it, he brought *trover* against the defendant who had taken it away, as bailiff of the Duke of *Norfolk*, who also claimed to have wreck of the sea in the same place, and some doubts arising upon the evidence given at the trial before Mr. Justice *Wilmot*, a special case was made for the opinion of the Court upon the point of evidence only; and no objection was ever taken or thought of, against the propriety of that action of *trover*, and judgment was given for the plaintiff.

The *gist* of the action of *trover*, is the wrongful detainer of goods which are the property of another; and the *gist* of trespass for goods, is the wrongful taking and detaining them, so that wherever *trespass* will lie for taking goods of the plaintiff wrongfully, it seems *trover* will lie for taking goods of the plaintiff wrongfully; so that there is no very material difference between the case in *Stran.* 777. and the present case.

There is a case in *Cro. Eliz.* 819. of *Basset* v. *Maynard*, and in 5 *Rep.* 24. *S. C.* very applicable

One claiming
a right to cut
down wood,

plicable to the present case cited by Serjeant *Wilson*; it was *trover* for certain loads of wood; upon a special verdict; the case was, Sir *Thomas Palmer* was seised of a great wood, and bargained and sold to one *Cornford* and his assigns, as many trees as would make 600 cords of wood, to be taken by the assignment of Sir *Thomas Palmer*.—*Cornford* assigns over his interest to the plaintiff. Afterwards Sir *Thomas Palmer* granted to the defendant so much of his wood as would make 4000 cords of wood, to be taken at the defendant's election.—The plaintiff afterwards by the assignment of Sir *Thomas Palmer* cut down the trees in question to make 600 cords: and the defendant claiming them by virtue of his grant took them.—And it was found that there was sufficient wood left for the defendant to take his 4000 cords. *Et si, &c.*—And upon this verdict it was moved, that here was not sufficient title found for the plaintiff.—For first, it is not found that the bargain and sale was for any sum of money, nor upon any consideration; *sed non allocatur*, for it is intended to be so, being found by the verdict. But if it had not been so found, it might peradventure, have been otherwise; as *primo mariæ*. *Dyer* 91. is.—Secondly, it was alledged that this grant to the plaintiff is void; for, until the assignment made by Sir *Thomas Palmer*, no interest vested in *Cornford* himself, so that he could not make any grant thereof over. But all the Court held the grant to be good: for being made to him and his assigns, he may make an assignee, which shall enure as a nomination to one, who is to have by the appointment of Sir *Thomas Palmer*. And it may well vest in him, as the interest also: and here he hath an interest before the assignment made

cuts it down; although he has no legal right to this wood, yet by cutting thereof he gains such a property therein, that *trover* lies against a stranger who takes it away.

made by Sir *Thomas Palmer*; inasmuch, that if Sir *Thomas Palmer* will not assign it in convenient time, he himself may take them, and therefore he may assign this interest, as 44 *Ed.* 3. 43. is.—But admitting the grant to the plaintiff had been void; yet *Popham* said that the action was maintainable, because by the cutting down of them he had *possession*, and a good title against the defendant, and every stranger; and being cut down it was not lawful for the defendant to take them: for if one fell 1000 cords of wood, to be taken at the vendee's election, and afterwards the grantor himself, or a stranger, cuts down some of the wood, the vendee cannot take that which is cut down: but he ought to make his grant good out of that which is growing. As if *estovers* were granted unto him, to be taken in a great wood, and the owner of the wood cuts down some of the wood, the grantee cannot take *that* which is cut down; but he must take his *estovers* out of the residue; and if all be cut down, he hath not any remedy, but an action upon the case. So here, although the plaintiff had not a good title, yet his having *possession* of them, being cut down, sufficeth. *Quod Gawdy and Clinch concesserunt.* Wherefore it was adjudged for the plaintiff.

It was submitted to the Court by Serjeant *Wilson*, that this case of *Basset v. Maynard*, was directly in point, or rather stronger than the case at bar, for it shews that although *Basset* had not a good title to the wood, yet that having cut it down, he thereby gained possession thereof, and a good title against *Maynard* and every stranger. So in the case at bar, *Rackham* by cutting down the rushes on the common, gained possession thereof, and a

The grantee of estovers cannot take wood cut down by the grantor.

good title against the defendants *Jessup* and *Thompson*, who have shewn no title at all to the rushes, but appear to be mere strangers.

Curia. A custom for all the inhabitants of *Theberton* to cut rushes on *Theberton Common* is a good custom; the plaintiff proved at the trial that he was an inhabitant, and that there was a custom for every body inhabiting *there*, to cut and take rushes on the place in question, that he (by his servants) having cut down five or six loads of rushes, the defendants took and carried the same away; this is such evidence of property in the plaintiff and conversion in the defendants, that they appear to be wrong doers, for they have neither by evidence or pleading shewn any right or title whatever to these rushes, and appear to the Court to be mere strangers. Indeed, if a person hath no colour of right at all to cut down rushes, or to take any other thing; he cannot, by cutting the rushes, or taking the thing, without any colour of right, acquire property therein; but in the case at bar the plaintiff proved he had a right to cut the rushes, that he did cut them, and we are all of opinion, that he thereby gained a property therein. As to what is reported by brother *Whitaker*, that the plaintiff's servants cut the rushes in the night-time, and the inference drawn from thence, that the rushes were cut, or obtained by *stealth*; the Court said, that in summer, when rushes are generally cut, the night-time, or very early in the morning, is the most proper time for that purpose; the Court also held the cases of 2 *Stra.* 777. and *Cro. Eliz.* 819. for good law, and seemed to think that the latter was a stronger case than the case at bar; whereupon,

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VOL. III.

For the pleadings in this cause, see 3 Will. 338.

Birt v. Barlow, 19 G. 3. B. R. Doug. 162.

The Court, under particular circumstances, will permit a new trial to be moved for after the four days are expired. In an action for crim. con. an actual marriage may be proved by a copy of the register; and the minister, clerk, or subscribing witnesses to the register are not the only competent witnesses to prove the identity of the persons married.

(c)
Vide The King and Gough.
Ante IX. (12.)
(b.)

per totam Curiam, the rule was made absolute for setting aside the nonsuit, and for a new trial; without costs on either side, the plaintiff having been nonsuited upon a mistake of the Judge in point of law.

This was an action of trespass and assault for criminal conversation with the plaintiff's wife. It was tried before BLACKSTONE, Justice, at the last assizes for *Kent*, when, by the direction of the Judge, the plaintiff was nonsuited.

On *Monday*, the 26th of *April*, *Rous* moved for a rule to shew cause why the nonsuit should not be set aside, and a new trial granted. *Wednesday*, the 21st day of *April*, was the first day of term, and, by the practice of this Court, all new trials (in causes tried in vacation) must be moved for within four days of the beginning of the term, including the first; so that *Saturday*, the 24th of *April*, was the last day for moving. However, *Rous* having stated, that he had understood that the four days were reckoned *exclusive* of the first, and BLACKSTONE, Justice, having desired, at the trial, that the opinion of the Court should be taken, the Court entertained the motion, which was founded on the ground of a misdirection in point of evidence; and the rule was granted.

(c)

This day BULLER, Justice, read the Judges report, which was as follows:

The first witness called by the plaintiff was *Thomas Sharpe*, who proved a copy of the register of the parish of *St. Alfred, Canterbury*, in *hac verba*—"1767, N^o 106, *John Birt*, Esq; of parish of *St. Margaret, Rochester*;
" CO.

(a)
also f
It is
c. 33.

" co. Kent, and Harriot Champneys, of this
 " parish, married by banns, 15 December
 " 1767, by John Lynch, minister. (Witnesses
 " Robert Lynch, Francis Champneys, Anne
 " Lynch, Elizabeth Lynch," (a). Another wit-
 nefs, (Susanna ———) was next called to
 prove the fact of adultery.—I was of opinion,
 that this was not sufficient evidence of the mar-
 riage, but that the identity of the parties must
 be proved, else it might possibly be a register
 of the marriage, not of the plaintiff and his sup-
 posed wife, but of some other persons of the
 same name. The counsel for the plaintiff then
 said, in the course of their examination to
 prove the adulterous intercourse, it would come
 out from the mouths of the witnesses, that the
 plaintiff's reputed wife was of the name and
 family of *Champneys*, and that they had long
 cohabited together, and were esteemed to be
 man and wife by all their friends and relations.
 I still thought that the evidence, so opened,
 would be insufficient, holding in conformity to
 the case of *Morris v. Miller*, reported in 4
Burr. 2057, (b) (and of which I also had a
 mss. note of my own) that this was the only
civil case in which proof of an actual marriage
 was requisite, as contradistinguished from ac-
 knowledgment by the parties, cohabitation,
 reputation, &c. That the *best* proof that could
 be given of an actual marriage was, by some
 person personally present at the solemnity,
 which, in my small experience, I had never
 seen an instance of not producing. If it did

(b)
 E. 7. G. 3.
 1 Black Rep.
 632.

(a) I presume the names of the husband and wife were
 also subscribed, although that was not stated in the report.
 It is expressly required by the marriage act, 26 G. 2.
 c. 33. § 15.

not appear that there were any persons present besides the minister *, and he was dead, perhaps other collateral proof might be admitted, which might render probable the identity of the plaintiff and his wife, and the persons whose marriage was so registered. But that in the present case, there appeared to have been no less than *five witnesses present* at the marriage thus registered, which was only eleven years ago. That the marriage act had directed the witnesses to subscribe their names to the register, (†) in order to facilitate the investigation of the legal evidence of marriages. And that 'till these five witnesses and the minister were accounted for, as by shewing them all dead, or the like, I could not admit less proof than that of some person present to demonstrate the identity of the parties. I accordingly nonsuited the plaintiff. After which, a proctor from the Ecclesiastical Court, then present, declared openly, that he had been subpoenaed by the plaintiff to prove, and could prove, the taking out of a *licence* for the marriage of the plaintiff and his reputed wife. I mention this circumstance, though it could be no ground of my determination, as it shews *something more than a bare possibility* that the plaintiff and his wife were not the identical persons so registered as marrying by banns."

Kempe, Serjeant, and Peckham, shewed cause. — They argued, that the marriage act meant to introduce some more accurate proof of marriages than what was in use before the passing of that act. This purpose was expressed in the preamble to the 15th section. It had accord-

* Two witnesses at least, besides the minister, are expressly required by the marriage act, § 15.

ingly

† 26 G. 2.
c. 36. § 15.

ingly been enacted, by that section, that witnesses should be present who should subscribe their names to the register; and the purpose of such subscription must have been to point them out, that they might be produced when it should become necessary to prove the marriage. There is no case in the law where subscribing witnesses are necessary, and yet it is not necessary to produce them, or, if they are shewn to be dead, to prove their hand-writing. The register proved the marriage of two persons of the same name with the plaintiff and his wife, but could not shew that they were those identical persons.

Dunning, and *Rous*, in support of the rule, observed, that the preamble, to the section of the marriage act relied on, professed an intention to render the proof of marriages *more easy*, and it would be a strange solecism to contrive it so as to render them more difficult. It was admitted, that the proof of a marriage was complete, and no case could be shewn which had determined, that there could be no other evidence of the identity of the parties, but the testimony of persons present. Proof of the parties having been seen going to church the morning of the day mentioned in the register, or sleeping together that night, would surely be evidence of the identity, and so would proof of their having cohabited together, from the time of the marriage downwards. In an action for goods furnished to a wife, evidence of cohabitation and reputation is sufficient. In a case of criminal conversation, something more, *viz.* an *actual* marriage must be shewn. This is done by the register; and when that is coupled with evidence of cohabitation and reputation, the proof is complete. As the copy

of the register only was produced (and was all that was necessary) the witnesses could not have proved their attestation, even if they had been called.

LORD MANSFIELD.—From the report it appears, that the ground of the nonsuit was an idea, that the identity must be proved by the minister, or some of the attesting witnesses, unless their not being produced is accounted for in the same manner as is required in the case of subscribing witnesses to a deed. The counsel for the plaintiff stated other evidence of the identity; whether such as would have been sufficient when produced (as that might, or might not be, according to the differences arising from the manner of stating it) I give no opinion: but the Judge decided that it was *necessary* to produce some of the subscribing witnesses. The clauses in the marriage act relative to registers are of infinite utility to the kingdom. They were meant, as well to prevent false entries, as to guard against illegal marriages without licence, or the publication of banns. The registers are directed to be kept as public books, and accompanied with every means of authenticity. But, besides facilitating and ascertaining the evidence of marriages, they were intended for other wise purposes. They are of great assistance in the proof of pedigrees, which has become so much more difficult since inquisitions *post mortem* have been disused, that it is easier to establish one for five hundred years back, before the time of *Charles II.* than for one hundred years since his reign. But this advantage would be lost, and it would be very prejudicial if the act were so construed as to render the proof of marriages more difficult than formerly. I take

it

it for granted, that the law stands as it did before in that respect. Registers are in the nature of records, and need not be produced, nor proved by subscribing witnesses. A copy is sufficient, and is proof of a marriage in fact, between two parties describing themselves by such and such names and places of abode, though it does not prove the identity. An action for criminal conversation is the only *civil* case where it is necessary to prove an *actual* marriage. In other cases, cohabitation, reputation, &c. are equally sufficient since the marriage act, as before. But an action for criminal conversation has a mixture of penal prosecution; for which reason, and because it might be turned to bad purposes by persons giving the name and character of *wife* to women to whom they are not married, it struck me in the case of *Morris v. Miller*, that, in such an action, a marriage in fact must be proved. I say, a marriage *in fact*, because marriages are not always registered. There are marriages among particular sorts of dissenters, where the proof by a register would be impossible; and *Dennison, Justice*, in a case of that kind which came before him, admitted other proof of an actual marriage. But, as to the proof of identity, whatever is sufficient to satisfy a jury, is good evidence. If neither the minister, nor the clerk, nor any of the subscribing witnesses, were acquainted with the married couple, in such a case, none of them might be able to prove the identity. But it may be proved in a thousand other ways: suppose the bell-ringers were called, and proved that they rung the bells, and came immediately after the marriage, and were paid by the parties; suppose the hand-writing of

the parties were proved; suppose persons called who were present at the wedding-dinner, &c. &c.

WILLES and ASHURST, *Justices*, of the same opinion.

BULLER, *Justice*.—The original register is not necessary to be produced, and it is only where *that* is required, that subscribing witnesses must be called. In this case, the wife's maiden name was *Harriot Champneys*. Suppose a maid-servant had proved that she always went by that name till the day of the marriage, that she went out that day, and, on her return, and ever since, was called *Mrs. Birt*? Surely that would have been evidence of the identity.

The rule made absolute (*).

Goodtitle ex
dim Robert Ed-
wards, versus
Peter Bailey, E.
17 G. 3. B. R.
Cowp. 597.

In ejectment which is a fictitious action to recover the possession, the lessor of the plaintiff shall not be permitted to defeat a solemn deed under his own hand, covenanting that the defendant shall enjoy the premises, and also, for further assurance.

Upon shewing cause why the nonsuit entered in this case should not be set aside, and a new trial granted, the facts appeared to be as follows:

It was an ejectment brought for two tenements in the county of *Dorset*, distinguished by the names of the Greater and Less Tenement. The plaintiff claimed under the will of one *Nicholas Edwards*, dated *March 12th 1750*, by which he devised the premises in question
“ to his wife *F. Edwards*, for life, and after
“ her decease to his brother *John Edwards*, to
“ be at his disposal: but in case he should
“ happen to die before the said *F. Edwards*,
“ then he gave the premises to his cousin
“ *Robert Edwards* (the plaintiff) and his heirs

* The cause was again tried at the ensuing assizes, and a verdict found for the plaintiff.

“ and

“ and assigns for ever :” and died soon after. Upon his death, *John Edwards* entered into and kept possession of the *greater* tenement during his life; and by will devised *both* the tenements to the defendant *Peter Bailey*. He was possessed of several other premisses, which he devised to the lessor of the plaintiff, by the same will: and died in the life-time of *Frances* the widow, who upon the death of *Nicholas* her husband, entered into and kept possession of the less tenement, till she died.— Upon the death of *John*, *Peter Bailey*, the defendant, took possession of the greater tenement, which *John* during his life had occupied. Soon after, *Robert*, the lessor of the plaintiff, by deed of release, bearing date the 5th of *January* 1764, reciting the will of *Nicholas*, and also reciting the will of *John Edwards* the brother of *Nicholas*; and further, that *Frances* the widow had survived *John*, whereby the reversion of the premisses were become vested in him, *Robert*, in fee; reciting also that it had been agreed that he the said *Robert* should renounce all his right, title, and interest in the said premisses to *Peter Bailey*, the said *Nicholas Edwards* having no power to devise the same; he did thereby renounce, remise, release, and for ever quit claim to the said *Peter Bailey*, and the heirs male of his body, all the said premisses, and all his right, title, and interest therein; with a covenant for further assurance. Subsequent to this release, the widow died; and then *Robert*, the lessor of the plaintiff, brought this ejectment. Upon the release being read and proved, several objections were taken to it at the trial, on the part of the plaintiff. 1. That there was no *privity* of estate between the lessor of the plaintiff and the

the defendant, at the time of the release. To this it was answered, that it was not a release by way of enlargement of the estate, but *pur mitter le droit*, therefore no privity was necessary: but this objection was given up. 2. That in respect of the lesser tenement, the widow being in possession, there was no estate in *Peter Bailey* at the time, upon which the release could operate. 3. That it was fraudulent upon the face of it, being without consideration; and also, for that the recital, relative to *Nicholas* having no power to devise the premises was false; to prove which, the plaintiff in reply produced the will of *John*, the father of *Nicholas*, giving the premises to *Nicholas* in fee. — But these objections were over-ruled by the Judge, who thought that as the lessor of the plaintiff took a considerable estate under the will of *John Edwards*, under which will the defendant claimed, he ought not to be allowed to impeach it; and accordingly directed a nonsuit.

Mr. *Mansfield* and Mr. *Buller* now argued in support of the nonsuit, and against the rule for a new trial. Mr. Serjeant *Heatb contra*, for the rule.

For the defendant it was argued, that supposing the *release* could not operate as *such*, for want of a sufficient possession in the releasee at the time, yet it might operate as a *grant* of the *reversion*. It is a settled rule in the construction of deeds, that if sufficient appears to shew the intention of the party to convey, though it cannot take effect in the precise form in which it was intended, it shall operate in the way in which it can, rather than the intent of the parties shall be frustrated. *Sheppard*, in his *Touchstone*, 82, says, “ A deed
made

“ made to one purpose, may enure to another; if meant for a release, it may amount to a grant of the reversion; or *e converso*.” So in 2 *Wils.* 75, a deed, intended for a release, was held to operate as a *covenant to stand seised*: and the cases there cited establish the doctrine. If so, nothing can be clearer than the intention of *Robert* to convey in this case; not only from the general words of the deed, but from the covenant for further assurance. But a decisive answer is, that the plaintiff is estopped by his own deed. The claim he sets up is expressly against his own deed, and the objections made to the form of it, go to defeat it. No man shall be suffered to do that. — As to the objection of *fraud*, because the recital relative to *Nicholas* is false, the circumstances manifestly shew there was some instrument, though none such has appeared, under which *John Edwards* was intitled, which warranted him in taking possession of the greater tenement, as he did, in the lifetime of the widow, and disposing of them both at his death, notwithstanding the will of *Nicholas*. With respect to there being *no consideration*, the estate which the plaintiff took under the will of *John Edwards*, was a sufficient consideration, for his confirming the devise of the premises to the defendant. But if it were not, as the plaintiff is content to take such estate, he ought not to disturb the other devisees in the will. Therefore upon every ground the nonsuit was right.

Lord *Mansfield*. — As to the objection of fraud observed, there was no *evidence* of any fraud; that the recital did not appear to be the inductive cause of the release; and unless some inducement was shewn, fraud could not be

be presumed. If any colourable evidence of fraud had been given, the nonsuit would have been wrong; because fraud in this case would be a matter of fact; of which the Jury are to judge. So if the plaintiff could have made out a case of *mistake*, it would have been equivalent to fraud. But nothing of the kind appears; and as to the consideration, it might be fair enough. It depends upon the treaty.

For the plaintiff as to the *other* point, it was contended, that admitting the rule laid down to be true in its fullest extent, yet nothing passed by the release in this case for want of proper operative words. There are appropriated terms to every conveyance: and where the word "grant" is used, being *genus generalissimum*, if the instrument cannot take effect according to its proper form, it shall operate in some other, if by law it can. But here the words are, "*renounce, remise, release, and quit claim,*" which are the special form of words adapted to a *release* only; therefore it cannot operate as a grant. And so is *Co. Lit.* 301. "A release cannot operate as a grant, because "it is a peculiar manner of conveyance adapted to a special end." In the case from *2 Wils.* 75, the word "*grant*" was used; and so it was in the cases there cited. But here there is no such word, nor any thing equivalent to it, consequently nothing passed by the deed. If not, the defendant's case is not aided by the covenant for further assurance; for that at most conveys only an equitable right: and as to its being an estoppel, the plaintiff is not estopped from saying any thing, but that the defendant has *no interest*.

LORD MANSFIELD.—The rules laid down in respect of the construction of deeds are founded

in law, reason, and common sense: that they shall operate according to the intention of the parties, if by law they may. And if they cannot operate in one form, they shall operate in that, which by law will effectuate the intention. But an objection is made in this case, which, it is said, takes it out of the general rule and the doctrine of the authorities cited: and that is, that in the release in question the word "grant" is not made use of. But that the intention of the parties was to pass all the right and title of the plaintiff in these premises, is manifest beyond a doubt. One thing however is decisive. This is a *fictitious* action to recover the possession. In such an action, if a man has made a solemn deed covenanting that another shall enjoy the premises, and likewise for further assurance, it shall never lie in his mouth to dispute the title of the party to whom he has so undertaken; no more than it shall be permitted to a mortgagor to dispute the title of his mortgagee. No man shall be allowed to dispute his own solemn deed. Therefore *quâcunq' via datâ*, the nonsuit was right. It would be very idle to set aside the nonsuit, only to send the party into equity, and make him pay the costs that way.

Aston, Justice.—This is the common wording of a release: but though in the shape of a release, if there are sufficient words, it may operate as a grant. The last ground however is decisive: it is clear from the general complexion and circumstances of this case, that there had been some dispute between the parties relative to the wills of *Nicholas Edwards*, and his brother *John*; and that this release was an agreement between them for the purpose of adjusting all matters in difference: and there

there is a covenant for further assurance. I think it would be extremely improper, after that, to let the party take a legal objection for the purpose of defeating his own solemn agreement.

Per Cur. Rule discharged.

Minns v. Baxter, M. 26 Geo. 3. B. R. Durnford and East. 1 V. 16.

The defendant is bound to search in the office, whether the plaintiff has brought in the issue roll, before he signs judgment of non pros, even though he may have searched on the expiration of the rule to bring in the roll.

Baldwin shewed cause against a rule, which had been obtained by *Shepherd* last Trinity term, calling on the defendant to shew cause, why the judgment of *non pros*, which had been signed in this cause, should not be set aside for irregularity. The irregularity consisted in this; the plaintiff had a four day rule to bring in the issue-roll, which expired the 14th of June last: the defendant on that day searched in the office, and the roll not being then brought in, signed judgment of *non pros* the next day at twelve. This practice *Baldwin* contended was regular.

Shepherd, contra. As in fact the judgment was not signed till after the roll was actually brought in the next morning, on the 15th, it was then irregular to sign judgment *without making another search*. He contended, that this was not like a case where a party puts himself in contempt; as, for instance, where an attachment is moved against him; because there the person, moving for such attachment being once intitled to it, does not waive his right, by omitting to take advantage of it on the very day. But it is like the case of a plea, where if it be not put in on the day the rule expires, and the other party does not take advantage of it immediately, the defendant may deliver his plea any time before judgment actually signed against him: and

The Court was of that opinion. And it appearing

pearing that the plaintiff's attorney had told the defendant's attorney of the irregularity, and had desired the matter might be rectified, without its being brought before the Court, but that he had refused, the Court made the Rule absolute with costs.

Upon shewing cause why the nonsuit entered in this case should not be set aside and a new trial granted, the facts, as they appeared by the report, were as follow: This was an action by an indorsee of a bill of exchange against the acceptor. The bill was drawn on defendant, and was made payable forty days after sight to one *Lenox* or order. *Allen*, the plaintiff's clerk, swore that on the 24th of *September* 1785, he presented the bill to the defendant who lived in *London*, for acceptance, who told him "that the drawer had consigned " a ship and cargo to him and another person " at *Bristol*, but as he could not then tell " whether the ship would arrive at *London* or " *Bristol*, he could not accept at that time;" upon which *Allen* said, that he would leave the bill upon this condition, that in the event of the defendant's not accepting it from the day when it was presented, he should be at liberty to note it for non-acceptance as from that time. To this the defendant assented, and the bill was accordingly left at his house, 'till the 8th of *October*, when *Allen* called again, in company with the plaintiff, to know whether the defendant would accept the bill or not, who on being pressed to accept, said "the " bill was a good one, and that it would be " paid, even if the ship were lost." *Allen* immediately upon this, carried the bill to a notary public, and had it noted for non-acceptance

Sproat v. Matthews, 26 G. 3. B. R. Durnford and East, 1 V. 182.

Where a bill of exchange was drawn upon A. residing in *London* by a consigner of goods living abroad; on its being presented for acceptance, A. said, he could not then accept, because he did not know, whether the ship would arrive at *London* or *Bristol*. B. the holder of the bill, agreed to leave it for some time, reserving the liberty of protesting it, for non-acceptance, in case A. did not accept. On a second application, A. said the bill would be paid even if the ship were lost. This is only a conditional acceptance, depending on two events, of the ship's arriving at *London*, or being lost. And B. having the liberty of re-

giving such conditional acceptance, precludes himself from recovering against A. by afterwards noting the bill for non-acceptance. Whether a conditional or an absolute acceptance, is a question of law.

ance from the time when it was first left with the defendant. The ship afterwards arrived safe at the port of *London*, and the cargo was disposed of by the defendant.

Buller, J.—who tried this cause at the last sittings at *Guildhall*, being of opinion that this amounted only to a *conditional acceptance*, which the plaintiff was at liberty to refuse or not as he chose, and that his noting the bill immediately after the second conversation, shewed that he was not satisfied with such conditional acceptance, nonsuited the plaintiff.

This motion had been made on two grounds;
1st. That this must be considered as an absolute acceptance.

2dly. That even if it were a conditional one, it should have been left to the Jury to consider whether the plaintiff had precluded himself by his subsequent conduct from recovering against the acceptor.

Wilson and Baldwin, against the rule, contended that this was only a conditional acceptance; and it was clear that it was so understood by the parties at the time; for if the plaintiff had considered it as an absolute acceptance, he would not have protested it immediately for non-acceptance. No person could explain the conversation which took place between the parties so well as themselves; and the acts of the plaintiff prove what an impression it made on him. After the plaintiff had protested the bill for non-acceptance, he ought not to be permitted to say, he was satisfied with the acceptance. It is conclusive against him; for by noting the bill for non-acceptance, he gave up the defendant altogether. Then it ought not to have been left to the

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the Jury to consider whether the parties had misunderstood the conversation.

Erskine and *Wood*, *contra*, insisted that the second conversation alone amounted to an absolute acceptance; if so, nothing which the plaintiff did could be a waiver of it. The words "*even if the ship were lost*," can only admit of one grammatical construction. It is taking for granted that the bill would be paid, if the ship arrived safe; and these words import, that it would be paid at all events, whether the ship was lost or not.

Then taking the second conversation as explanatory of the first, it proved that the defendant only doubted at first on the event of the ship's arrival at *London*; but that doubt was put out of the question, by the subsequent conversation, when he said he would accept at any rate, even if the ship were lost; that is, even if that event should take place which he apprehended and doubted at first.

But supposing the acceptance to be conditional, the event, on which the defendant was to accept, having happened by the arrival of the ship at *London*, the only point to be considered was, whether the plaintiff had precluded himself by his subsequent conduct, in noting the bill, from having recourse to the defendant. This might be reconciled from considering the purport of the bill, which was payable forty days *after sight*. The *noting* of the bill *was not* for the purpose of protesting it for non-acceptance, but only in order to ascertain the time when it was presented for acceptance. At all events, if there was any ambiguity in the transaction, either respecting the acceptance, or the waiver of it, it should have been left to the Jury to consider, whether, under

der all the circumstances, the plaintiff had precluded himself from recovering on this acceptance.

LORD MANSFIELD, *Ch. J.*—was absent on this day, and continued absent during the rest of the term.

WILLES, *J.*—Whether this nonsuit was right or not, depends on two questions.

1st. Whether this was an absolute, or a conditional acceptance? in determining which, we must consider the two conversations between *Allen* and the defendant together. When the bill was first presented to the defendant for acceptance, he said, he could not accept at that time, because he did not know, whether the ship would come to *London* or not. The reason of this answer is obvious, because if the ship arrived at *Bristol*, she was consigned to another person. Then, in a subsequent conversation, he said, “the bill will be paid, even if the ship be lost.” So that he accepted on two conditions; namely, the *one*, if the ship came to *London*, in which case he would be enabled to pay himself with the profits of the cargo; *the other*, in case the ship was lost, when he would have wherewithal to satisfy the bill, he having a policy of insurance on the ship in his hands: but he did not accept in the third instance, which was in the event of the ship’s going to *Bristol*.

The Court has not of late been very nice with regard to what shall be construed to be an acceptance; for though, formerly, it was held necessary, that an acceptance should be in writing, yet of late years, a parol acceptance has been deemed sufficient. And indeed, at present, almost any thing amounts to an acceptance. Therefore, if there were a doubt, whether

whether this was a conditional or an absolute acceptance, or whether (admitting it to be a conditional one only) the party had precluded himself by his subsequent conduct, the whole of the facts should have been left to the Jury. So that I am of opinion that the nonsuit ought to be set aside.

ASHHURST, J.—I do not concur with my brother *Willes*, that this nonsuit ought to be set aside. In the case of a written acceptance, the acceptance speaks for itself: but this being a parol acceptance, the conduct of the plaintiff is decisive against him. And the *evidentia rei* shews that he put the right construction on this transaction, by procuring the bill to be noted. On the first conversation, the defendant expressed a doubt, whether the ship would come to *London*, or to *Bristol*; if to *London*, he would have had effects in his hands to indemnify himself, because the cargo was consigned to him; if to *Bristol*, it was consigned to another person. Then it was agreed between the parties, that the bill should be left with the defendant, with liberty to the plaintiff to note it, as from the first tender of the bill, in case the defendant should not eventually accept. On the second conversation, the defendant is represented to have said, "the bill will be paid, even if the ship be lost." The witness might have varied this phrase.

But at all events, this only amounted to a conditional acceptance, in case the ship arrived at *London*, or was lost; which the plaintiff afterwards waived. If the party had conceived it to be an acceptance, he should have required that to be signified on the bill itself: then it was said that the reason why the bill was noted, was to mark the time from which

it was to be considered as accepted ; but that might have been better effected on the bill, by accepting it as from that day. Then it is manifest that the parties understood at the time, that the matter was left unconcluded. If so, the plaintiff is absolutely bound by his subsequent act ; for he protested the bill for non-acceptance ; therefore, there could be nothing to leave to a jury.

Buller, J.—We are now to determine on a point of law, which is decisive that this question ought not to have been left to the Jury. Whatever may have been the doubts formerly of what amounted to an acceptance, I conceive it is the sole province of the Court to decide, whether this is an absolute or a conditional acceptance. This case was proved by one witness, on the part of the plaintiff ; the defendant's counsel admitted this evidence to be true ; but insisted that upon that evidence, the defendant was not liable in point of law. Then there was nothing to be left to the Jury. If the defendant had objected at the trial that the plaintiff's witness might be mistaken in his expressions, that might properly have been left to the Jury, who are to decide on the credit or accuracy of a witness. Then, supposing these facts had been stated on a special verdict, the Court would have been bound to determine whether this, in point of law, was an acceptance or not. And this brings it to the true question before us, namely, whether this is a conditional or an absolute acceptance ? There is no ground for saying it was an absolute one. It was not thought of at the trial ; and the words of the defendant preclude every idea of it. Taking both the conversations together, it is decisive against the plaintiff. At
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Rule discharged.

Case for goods sold and delivered.

Pleas the general issue, and a set-off.

The cause was tried at the last assizes at *Lancaster*, before *Willes*, Justice, when the plaintiff was nonsuited.

On a motion to set aside the nonsuit, it appeared, that the plaintiff had bargained to sell to the defendant, who lived at *Manchester*, a quantity of tobacco, the value of which, in addition to a former debt of £. 23. for some other tobacco, amounted to £. 50. It was

Alexander v. Owen, E. 26 G. 3. B. R. Durnford and East. 1 V. 225.

Where goods are delivered under an agreement to take a specific parcel of copper money in payment; a delivery of such copper will be a good bar to an action for the value of the

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if rescinded as
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agreed at the same time between the parties, that the plaintiff should take in payment of that debt, a quantity of copper halfpence, which were made up in crown papers, in each of which was no more than five pennyworth of good halfpence; and it was also agreed, that if the amount of the copper should exceed the value of the tobacco, some more of the latter should be sent to balance the amount. Part of the tobacco was delivered, but the plaintiff refused to send the remainder, unless the defendant would pay for the whole in good money. Several samples of this copper were shewn to the plaintiff at the time of the agreement, who said it would pass very well at *Liverpool*, where he lived. The copper was accordingly sent to the plaintiff, on the 19th of *July*, and on the 30th of *August* the defendant wrote a letter to the plaintiff, refusing to take it back, in answer to a letter of his of the 28th of the same month, complaining of the badness of it, and refusing to accept it. It also appeared, that before the writing of this letter, the parties had corresponded on the subject: but the copper was not actually returned till *November*.

The question was, Whether the delivery of the copper was a good payment? If so, there was more than enough to balance the plaintiff's demand. *Bolton*, Serjeant, against the rule, insisted that this was not a contract for the purpose of uttering bad money, which would have been illegal, and therefore void under the stat. 15 *Geo. 2. c. 28.* but it was an agreement by the plaintiff to take a specific parcel of copper, which was valid and legal. But supposing it otherwise, the plaintiff was equally culpable with the defendant, and as it appeared

appeared that he had seen the identical copper at the time of entering into the agreement, he ought not to be permitted to object to it now, as an illegal contract.

Scott and Haywood, contra, contended that this agreement was void, because it was an agreement to commit an offence; and therefore the defendant could not protect himself under it, for, independent of the statute of the 15 Geo. 2. it was a misdemeanor to utter counterfeit money knowing it to be such.

But supposing the plaintiff would have been bound by the agreement, if it had been concluded; yet it was only executory, for the plaintiff sent word that he would not take the copper money as payment; and he kept back part of the tobacco which had been agreed for. If an action had been brought by the defendant to compel the delivery of the rest of the tobacco, he could not have recovered, because there was no legal consideration: and if the defendant had never sent this copper in payment, the plaintiff could not have compelled him to perform the contract, which would have subjected him to a criminal process. Then he ought not to be permitted to take advantage of it in this shape.

This question should have been left to the Jury, to determine the extent of the agreement; and at least the plaintiff was entitled to recover that part of his debt which accrued previous to this contract.

It has been settled, that if a contract is valid as to part, and void as to the rest, the plaintiff may recover upon that part of it which is legal. *Robinson v. Bland*, 2 Burr. 1077.

WILLES, J. declared himself satisfied with the nonsuit.

ASHHURST, J.—The nonsuit in this case ought to stand; for it does not appear that the parties entered into this contract, knowing it to be illegal: but even if it were so, it does not lie in the plaintiff's mouth to take advantage of it.

BULLER, J.—It has been objected that this is an illegal contract: there is no doubt but that an agreement to take counterfeit money, knowing it to be so, is void; but the fact does not come up to it in this case. The plaintiff did not agree to take counterfeit money in payment, but the agreement was to take such copper money as was then shewn to him.

Supposing, however, that this contract was illegal, the plaintiff would not stand in a better situation. He could never recover; for the argument of the plaintiff's counsel, in case an action had been brought by the defendant to recover the remainder of the tobacco, would have been equally applicable to the plaintiff. It cannot be said that the sale is good, and that the payment is bad; if it is an illegal contract, it is equally bad for the whole. It would be great injustice to allow the plaintiff to recover in this action the whole value of the goods sold, because that would be permitting him to take advantage of a corrupt agreement, which is never allowed in cases where a party applies to the Court to set aside such agreements.

That was the principle on which the Court went in a late case of *Fitzroy and Gwillim* (a), where they said, that, if a party applies to the Court to rescind a contract on the ground of its illegality, it must be done in *toto*, and he must not derive any advantage under it. The parties are in *pari delicto*, and if one of them seeks relief,

(a)
Durnford and
East, 1 V. 154.

relief, he must first do what is just; according to the principle established on the other side of the hall, that he who asks equity must do equity.

This nonsuit will not preclude the plaintiff from recovering the £. 23, which was owing upon a former agreement, because that debt arose from a fair and valid transaction: but that is no reason for setting aside the nonsuit in this case.

Rule discharged.

Debt for two penalties of £. 500 each, under the statute of the 2 Geo. 2. c. 24. for preventing bribery at elections.

This was tried at the last assizes for the county of *Devon*, before *Eyre*, Baron, when the plaintiff was nonsuited upon the ground that there was a variance between the precept stated in the declaration, and the one which was proved.

The declaration recited the writ to the sheriff for the election of members to serve in parliament, and then proceeded to state, that the sheriff *made his precept* to the portreeve of the borough of *Honiton*, which concluded in these words, "and *if* the said election so made, " distinctly, and openly, under the seal of the " portreeve, and the seals of those who should " be present at such election, the said portreeve should certify to the said sheriff, so " that the said sheriff should certify to his said " majesty, in his said majesty's chancery, at " the day and place aforesaid, without delay; " remitting to the said sheriff one part of the " aforesaid indentures, so that the said sheriff " might remit the same to his said majesty, " annexed to his majesty's writ." The precept when produced, had not the word "*if*,"

King v. Pippet,
E. 26 G. 3.
B. R. Durnford
and East, 1 V.

235.

In an action for bribery at an election where the declaration set forth the precept from the sheriff to the portreeve of a borough, the improper insertion of the word "*if*," in such precept is not a fatal variance, but it will be rejected as surplusage.

which

which the Judge thought did not support the declaration.

Gibbs shewed cause against a rule which had been obtained to set aside this nonsuit.

The precept stated in the declaration, is not proved by the real one, which has a perfect conclusion inasmuch as it contains a positive direction to the portreeve to proceed to election, and return the precept; whereas that set out in the declaration has an imperfect and conditional conclusion.

(a)
Douglass, 642.

The principle laid down in the case of *Bristow* and *Wright* (a) decides, that this is a legal objection. That was an action against the sheriff, for taking goods without leaving a year's rent. In the declaration, the particulars of the demise were set forth, which was held to be unnecessary; but the plaintiff, having undertaken to do it, and not proving them as set forth, was nonsuited. It was said by Lord *Mansfield* in that case, that "the distinction is
" between that which may be rejected, as surplusage, (which might have been struck
" out on motion) and what cannot. Where
" the declaration contains impertinent matter,
" that will be rejected by the Court, and need
" not be proved; but if the very ground of
" the action be mistated, as where you undertake to recite that part of the deed on which
" the action is founded, and it is misrecited,
" that will be fatal; for then the case declared
" on, is different from that which is proved,
" and you must recover *secundum allegata et probata*." The question then is, whether the setting out this precept be impertinent or immaterial? if the former, the variance in the declaration is not fatal, because in such case, it is not necessary to prove the precept; but

if

if immaterial only, as the plaintiff has undertaken to set out that which he need not have done, he is bound to prove it as stated. Here perhaps it might have been sufficient to have stated that there had been an election, and that at such election the bribery had been committed; but the plaintiff having undertaken to set out this precept, is bound to prove it as set forth, because he makes out his case through it.

If the insertion of the word "if" makes any alteration in the sense, it is a sufficient objection; and it is clear in this case, that it alters the signification of every subsequent word, by making that conditional which ought to be positive: therefore every word which follows "if," in the declaration, must be taken in a different sense from that in which they are to be understood in the precept. It is not enough to say, that by the rejection of the word "if" the sense will be complete, for any person reading this record, would rather suppose that something had been omitted in the conclusion, than that the word "if," had been improperly inserted in this part.

Lawrence and Watson contra argued, that the declaration did not affect to set out the *tenor* of the precept, in which case the variance would have been fatal; but it only stated that the sheriff had made his precept, by which he had given certain directions to the portreeve,

The Court may not only read the declaration without the word "if," but even without any part of the precept in which it is contained, because it was not necessary to be set forth. In the case of the *King and Beach* (a), *undertood* was written for *understood*, in the assignment

(a)
Cowp. 229.

signment of perjury, which was held not to be a fatal variance. If then the Court can supply a letter in order to make sense, they may also reject a word for the same purpose. For the introduction of the word "*if*" makes the whole sentence unintelligible.

In the case of *Bristow* and *Wright*, the whole of the contract was necessary to be proved, and consequently the *time* when the rent was payable; but here the matter stated was perfectly unnecessary. The mode of election, and the return by the portreeve to the sheriff, were irrelevant to this action, and therefore they may be rejected as surplusage, according to what was said by the Court in *Bristow* and *Wright*, with respect to irrelevant covenants in a lease.

(b)
Douglass. 133.

The *King* and *May* (b) was an indictment for perjury, committed on the trial of an indictment for an assault, in which were these words, "whereby his life was greatly *despaired* of." This last indictment was set out in the former, omitting the word "*despaired*;" this was *supplied* by the Court, upon the ground that the omission of that word made it nonsense; the same reason therefore holds for *rejecting* this word.

They then cited *Wilson* against *Mawson*, at the sittings after *Michaelmas* term, 13 *Geo. 2.* at *Westminster*. That was an action for false imprisonment, and the bill of *Middlesex*, upon which the party had been arrested, was set forth in the declaration as follows: that the sheriff was commanded to take A. B. (the then defendant) and *John Doe*, if, &c. and them, &c. so that he might have their bodies before our Lord the King, at *Westminster*, on, &c. (*verbatim* to the end.) The bill of *Mid-*

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dlesex

dlesex being read, was in these words: the sheriff is commanded to take *A. B.* and *John Doe*, if they shall be found in his bailiwick, and them safely keep, so that he may have their bodies before, &c. it was insisted by the defendant's counsel, that this was a variance between the bill of *Middlesex*, and the record, and that it was not sufficiently set out, on account of the words, &c. *Sed per Lee, C. J.* the objection is, that all the bill of *Middlesex* is not set out in the record, but there is no occasion to set it all out. The substance is sufficient, and there is no variance between the bill of *Middlesex*, and so much of it as is set out in the record.

So also the case of *Hendray* against *Spencer* (a), which was an action brought by the high bailiff of *Westminster*, against the defendant, in the nature of an escape. The declaration stated a *latitat* against *Donner* and *J. Doe*, with an *acetiam* against *Donner*, for £. 30. That a warrant was made to the high bailiff, &c. and that the plaintiff (the high bailiff) arrested *Donner*, and delivered him to the defendant, who promised safely to keep him, but afterwards permitted him to escape, by which means the plaintiff was obliged to pay the money. The writ produced in evidence, was against *Donner* and two others, and not against *J. Doe*. Mr. *Mansfield*, on behalf of the defendant objected that this writ did not prove the declaration, but was a variance; for a writ against *Donner* and two others, could not be the same as a writ against *Donner* and *J. Doe*. *Wallace contra*, said, the only question was, whether such a writ issued, as warranted the arrest of *Donner*, and that had been proved. Lord *Mansfield* over-ruled this objection, and said,

(a)
Sittings at
Westm. after
Mic. 1773.

said, this was a sufficient writ to warrant the arrest, and that was all that was necessary.—Plaintiff had a verdict.

WILLES, J.—I am of opinion, that this nonsuit ought to be set aside. It is agreed that the whole precept need not have been set out; so that stating it was surplusage. It is likewise agreed, that the precept is not set out according to its *tenor*. But it is objected that the last clause of the precept is set out as conditional, instead of its being a positive averment. If it were so, the argument would have some weight: but I do not think the insertion of the word “if” varies the sense of the sentence; but, if it has any effect, it makes nonsense of a precept, which ought not to have been set out at all, therefore the Court is bound to reject such a word. The case of the *King and Beach* (b) applies very strongly; there the omission of the letter “s,” did not change the sense; neither in the present case does the addition of the word “if,” convey a different meaning. If this word be rejected, the sense is complete; and I think we are warranted in rejecting it by the case of *Hendray v. Spencer*, where though there was a variance in the names of the two persons in the writ, yet enough of it was set forth to warrant the arrest.

This is totally different from the case of *Bristow v. Wright*. There the demise was particularly set forth, which varied materially from the demise as proved; therefore the sense itself was different.

ASHHURST, J.—I think the Court may, and ought to reject the word “if,” as surplusage; for on reading the record, we see that the word introduced is nonsensical. The

Court

(b)
Cowp. 229.

Court is bound to judge according to certain and known rules of law, and they must take notice, *ex officio*, of what is the form of the precept. It is a matter of notoriety, and looking on the record, we see the word "if," inserted, which is contrary to the form of the precept. Therefore, this is not like a matter in *pais*, which the Court can know nothing of 'till it comes before them.

This case does not appear so strong as those of *Hendray v. Spencer*, and *Wilson v. Mawson*; for the addition of a name was a thing which the Court could not possibly know 'till the production of the writ at the trial: but this is what they must, on reading, know to be wrong. Therefore I am of opinion, that the nonsuit ought to be set aside.

BULLER, J.—The declaration in this case is much longer than it need have been. There was no necessity to set out the precept, but, being set forth, the question is, whether the variance is or is not material? I think it is impossible for any person to read this part of the declaration, without knowing what it should be: every one must see by it, that the portreeve is *absolutely to certify to the sheriff, &c.* The insertion of the word "if," is a mere mistake. The case of the *King v. Beach*, is much stronger than the present. There, the Court supplied a letter to make up a word, which was necessary in setting out an indictment: but here, it was not necessary to state the precept at all. But it does not rest here only: there are other cases equally strong, as *Hendray v. Spencer*, and *Cuming v. Sibly*, *E. 9 Geo. 3. C. B.* which was an action for bribery: there the declaration stated the precept to be directed to the *mayor only*; but the precept which was proved, was directed to the

Mayor and Burgeffes; and the only question in the case which was reserved for the opinion of the Court, was, whether the precept that was proved, supported the declaration? The Court of Common Pleas was of opinion, that it did, and gave judgment for the plaintiff. In that case, there was a variance in the person to whom the precept was directed; but the Court was of opinion, that if it were the same in substance as that which was set forth in the record, it was sufficient, unless the *tenor* was stated. So in this case, the variance, to have any effect, must be a variance of sense, and of something material.

(a)
Dougl. 643.
(b)
Dougl. 640.
(c)
Dougl. 695.
Vide post IX.
(19.)

The three principal cases which have been argued in this Court of late years, are, *Skute v. Hornsey* (a), *Bristow v. Wright* (b), and *Grant v. Afle* (c), all of which were upon contracts. In these kind of cases, it is necessary to set out the contract in the declaration; and if it be different in any part, the whole foundation of the action fails, because the contract is entire.

(d)
Trin. 7 Geo. 3.
R. R.

In the case of the *King v. Lookup* (d), which was an indictment for perjury; the objection was, that the indictment stated the bill in Chancery, to be directed to "*Robert Lord Henley, &c.*" whereas it was directed to "*Sir Robert Henley, Knight, &c.*" But that objection was over-ruled.

(e)
2 Stra. 1155.

The case of *Shuttleworth v. Pilkington* (e), is likewise extremely strong. That was an action on a bail bond. The special original was returnable, *coram domino rege ubicunque tunc fuerit in Angliâ*: but the word "*ubicunque*," was omitted in the bail bond: and it was objected, that by the statute of *Hen. 6.* (which was pleaded) the sheriff could take no bond, but

but such as corresponded with the writ; whereas this might be to compel an appearance out of *England*, if the king should happen to be so. But the Court said it was sufficient in these bonds, to state in *substance*, the design of the writ; and that they would understand, that by appearing before the king, was meant before the king in his court, and not before the king in person. And the plaintiff had judgment.

In the present case, the sense of the precept as stated in the declaration, is the same as that which was proved: it commands the returning officer to proceed to an election. Therefore as this is not a variance in sense; I am of opinion, that the nonsuit should be set aside.

Rule absolute.

This was an action on a policy of insurance, which came on to be tried at the sittings after last *Easter* term, at *Guildhall*, before *Buller, J.*—who nonsuited the plaintiff.

Upon a motion to set aside that nonsuit, the following facts were reported, That the insurance was upon goods on board the ship *Emanuel*, at and from *Falmouth* to *Marseilles*, warranted a *Danish* ship; and on the policy was this memorandum; "The following insurance is declared to be on money expended for reclaiming the ship and cargo valued at the sum which shall be declared hereafter. The loss to be paid in case the ship does not arrive at *Marseilles*, and without farther proof of interest than this policy; warranted free from all average, and without the benefit of salvage."

It appeared that the plaintiffs were proprietors of the cargo, but not of the ship. That the ship originally sailed with the cargo on board

Kulen, Kemp and others against Vigne, T. 26 G. 3. B. R. Durnford and East, 1 V. 304.

Money having been expended in reclaiming a cargo on board a ship captured, was insured by the owners upon the event of the ship's arrival at *Marseilles*. The ship being captured and restored upon appeal, relinquished her voyage, and was afterwards lost. Pending the appeal, the goods were ordered to be sold, and the expences of the appeal were afterwards defrayed there-with, yet an

avement of a loss by capture is bad, because the ship might notwithstanding the capture have afterwards arrived at *Marseilles*: and this being a wagering policy, the assured could not at any time abandon.

board from *Riga* on a voyage to *Marseilles*, and that an insurance had been effected at *Bremen* upon the cargo for that voyage; in the course of which she was taken, and brought into *Falmouth*, by an *English privateer*. That sentence of condemnation had been there obtained, which was afterwards reversed upon the prize having been proved to be a neutral ship, but the expences of procuring that reversal were ordered by the admiralty court to be a charge upon the cargo. The plaintiff's agents accordingly paid the sum of £.1031. 14s. for the expences of reclaiming the ship and cargo; and immediately procured the policy in question to be effected in *January* 1781, according to the purport of the *memorandum*. In the *February* following the ship set sail from *Falmouth* with the original cargo on board, in the prosecution of her voyage to *Marseilles*; but on the 26th of the same month, before her arrival there, was captured by a *Spanish* ship, and carried into *Ceuta* in *Spain*, where she was again condemned.

An appeal was brought in the superior court of *Madrid*, which promising to be of long continuance, the cargo, which was of a perishable nature, was ordered to be sold, and the proceeds to be brought into court, to wait the event of the suit. In *May* 1783, the vessel was restored by sentence of the court, and the surplus of the proceeds which arose from the sale of the cargo, was paid to the owners, deducting the expences incurred in *Spain* in prosecuting the appeal. After all the charges paid, there only remained twenty-six rix-dollars. As soon as the ship was liberated, she sailed from *Ceuta* to *Malaga*, in order to refit, and having there made the necessary

cessary repairs, set sail for *Bremen*, and in that voyage was lost.

The insurance made upon the cargo at *Bremen* has been paid. The declaration averred, that “ *whilst the ship was proceeding in her said voyage from FALMOUTH to MARSEILLES, and before she could arrive at MARSEILLES, she was captured by the SPANIARDS, and thereby the said ship, and also the goods and merchandizes on board her, were totally lost to the plaintiffs.*”

Buller, J.—then proceeded to observe, that at the trial, it was objected on the part of the defendant; 1st. That this was not an insurable interest; and, 2dly. That the plaintiffs could not recover upon the policy in this form of declaring, for they had stated the loss to have happened by *capture*; whereas, though the vessel was captured, yet, having been afterwards restored, she might have reached her destined port notwithstanding the capture, in which case the underwriters would have been discharged by the terms of the memorandum. And that he, being of that opinion, had nonsuited the plaintiffs.

Erskine and *Adam* shewed cause, and contended that the nonsuit ought to stand, as well upon the merits, as upon the validity of the objection, which had been taken in point of form. It is material in the first instance for the Court to consider how far the averment made by the plaintiffs, that they are interested in the premises, is well founded in point of law; for if it appears that the under-writers at *Bremen* were answerable for the expences which had been incurred in reclaiming the goods, in that point of view the present contract would amount to a re-assurance, and was consequently

void. Then as to the event insured, which is the arrival of the *ship* at *Marseilles*; in order to entitle the plaintiffs to recover upon an averment of a loss by capture, they should have proved that the ship did not arrive there in consequence of the *capture*. But notwithstanding that event, the ship might afterwards have reached her port of destination.

This policy is essentially defective and nugatory; for the subject matter of the insurance is entirely unconnected with the event which is insured against, the plaintiff not having insured against any event by which he might be deprived of his property. And whether the ship and cargo arrived or not at *Marseilles* was perfectly immaterial; for, if the ship and cargo arrived, the plaintiffs could not have been reimbursed the expences which they had been put to; the cargo would still only have been worth its original value; and if it did not arrive there, the under-writers at *Bremen* would have been liable. So that it would have made no difference as to the real interest of the plaintiffs, whether this insurance had been made upon the arrival of any other ship; and it is in the nature of a wager.

To entitle the plaintiffs to recover, it was incumbent on them at the trial to have shewn two things; 1st. That the vessel used her utmost endeavours to get to *Marseilles*; and for this purpose it must be taken that the plaintiffs had a right to order the destination of the vessel. 2dly. That she was prevented from arriving there by some peril insured against. The event insured against here, was the non-arrival of the ship at *Marseilles*, and there is an averment that the ship was captured. If this had been a policy upon interest, the averment that

that the ship was captured would have been good; for in such case, wherever the voyage is interrupted or defeated, the party interested may abandon; but it is otherwise upon a wagering policy; there being nothing to abandon, as the subject matter of the insurance in question is incapable of abandonment; and this distinction was taken in *Fitzgerald and Pole* (a). Here then the plaintiffs have entered into two inconsistent contracts. As against the under-writers at *Bremen*, the plaintiffs were entitled to abandon upon the first of these contracts, and recover as for a total loss; for such a policy is an indemnity against a particular event by which a loss or damage may accrue to the thing insured: but with regard to the present contract, the event insured being the arrival of the ship at *Marseilles*, the plaintiffs could not abandon, but were bound to use their best endeavours to send the ship thither. For, if by any act of the assured, as by abandonment, it was rendered unnecessary for the ship to proceed to *Marseilles*, and in consequence, she steered a different course, the under-writer was instantly discharged. Therefore, the very act of abandonment, which enabled the plaintiffs to call upon the under-writers at *Bremen*, precludes them from maintaining their present demand.

Piggot and Baldwin, contra, argued from the clear intention of the parties, that the only object of the insured, in procuring the policy in question to be effected, was to indemnify themselves against the expences which they had been put to in reclaiming the cargo. They had acted *bonâ fide*, and laid all the information which they were in possession of before the under-writers. This demand is declared

(a)
5 Brow. App.
137.

to be for money actually expended upon the goods, and therefore the increase is only to be considered as an increase of the original value of the cargo, and as if it had been underinsured at first; in which case it would certainly have been competent to them to have covered the whole of their interest by a fresh insurance.

Although by the terms of the *memorandum* on the policy, the event insured was the arrival of the *ship* at *Marseilles*, and *not* of the *cargo*; yet that must necessarily be confined to her arrival in *that voyage*. It could never have been the meaning of the parties that the assurers were to be discharged, if the ship arrived at *Marseilles* at any distance of time; every contract of this nature is obviously confined to the voyage intended. But if the object of the voyage was defeated, by any peril in the course of it, the continuation of it became nugatory, and the assured having in consequence abandoned that voyage, and afterwards steered a different course, cannot be considered as amounting to a deviation, for the purpose of discharging the under-writers; for the moment that the voyage was defeated, that event happened upon which they were liable. The subsequent sentence for restoring the ship and cargo will not vary the question. When the vessel was taken and carried into *Ceuta*, it was impossible to foresee what expences would be incurred, and the cargo being of a perishable nature, it was thought most for the advantage of all parties to dispose of it; this being accordingly done, a total end was put to the voyage, and from that moment the defendant was fixed. What afterwards became of the ship, was perfectly im-

material to these parties. The sale therefore of the cargo, being the unavoidable consequence of the capture, must have relation back to its original cause; and then the averment in the declaration is true and proper.

Lord MANSFIELD, *Ch. J.*—The interest on which the plaintiff effected this policy, was money laid out in reclaiming the *cargo*. The event insured by the policy, was the arrival of the *ship* at *Marseilles*. If *she* did not arrive, then the money was to be paid; if *she* did, there was an end of the insurance; a loss accrued upon the cargo in the voyage; the under-writer is sued, and the loss is averred in the declaration to be *by capture*. The fact of the case is, that the ship was taken by a *Spanish* privateer, but was afterwards restored, and in a condition to pursue her voyage, and was afterwards lost in another voyage.

The answers to this case are decisive.

First, this is a wagering policy, and it is just the same, as if the event insured, had been the arrival of any other ship at *Marseilles*. The loss or safe arrival of the ship did not alter the security. The parties were interested in the *cargo alone*, but the event insured, was the arrival of the *ship* and *not* of the *cargo*. A necessary consequence of this being a wagering policy, is, that the insured cannot abandon. But, even supposing it to be a policy on interest, it is enough to say, that in this case, the parties never did abandon. In effect, there was only a temporary capture, and though by construction, a temporary capture is such a loss, as that an assured upon interest is warranted in abandoning at the time, if he pleases, yet we must consider what the truth of the

case was, between these parties; now this was a wagering policy, and in such case, there can be no abandonment.

But what alone is a fatal objection to the plaintiff's claim is, that they did not attempt to pursue the voyage to *Marseilles*, which it was in their power to do, after they left *Ceuta*. The circumstance of the ship's having been captured and detained for a time, did not prevent her from prosecuting her voyage after she was liberated. Nor is it any excuse, that the plaintiffs could no longer control her destination; for in wagering policies the assured take upon them to perform all that the owners themselves of the vessel could have done in the same situation.

Therefore in every point of view, the plaintiffs are precluded from recovering.

WILLES, J.—I shall confine myself to the formal objection which has been taken, because I have some doubts, whether the plaintiffs had not an insurable interest; for by the sentence of the court of admiralty, the expences of reclaiming were thrown upon the owners of the cargo, by which the price of it was increased; therefore I forbear to give any opinion upon that ground. But on the other grounds it is clear, that the plaintiff cannot recover. In the first place, there was certainly a deviation, for the ship set sail for *Malaga*, instead of proceeding to *Marseilles*. Secondly, the plaintiff has declared for a loss by capture; but after the capture, the policy might still have been complied with by the ship's going to *Marseilles*; and therefore the loss cannot be said to have happened by that circumstance.

ASHHURST, J.—I am of the same opinion with

with my lord upon both points. In the first place, this is to be considered as a wagering policy; and in such case, the party insured takes upon himself to do every thing which the owners of the ship might have done; and they might have directed the ship to *Marseilles*. It is also certain, that the party insuring a ship to any place, must use all due diligence to further her voyage thither, which not having been done in this case, upon that ground also the nonsuit ought to stand.

BULLER, J.—It would be a sufficient objection in this case, that the loss is averred to be *by capture*; but as the merits have been gone into, I shall give my reasons for supporting the nonsuit upon these grounds also. Policies of insurance are of two sorts, either upon interest, or by way of wager. Where it is upon interest, it has been solemnly determined, that it is merely a contract of indemnity, and therefore ought to be so framed, that the party can only recover in case of a loss really sustained, and to the precise amount of that loss. My opinion at the trial was, that the parties had it in view to insure a real interest, and protect themselves by the policy. But whatever their intentions might have been, the Court is bound to look to the instrument, and see what they have done; and if they have not expressed their intentions upon the policy, the Court cannot help them, and they must remain bound by their contract. The circumstances of this case are, that the plaintiffs were owners of the cargo, but were not interested in the ship. They laid out the money which is the subject of the insurance in reclaiming both after a capture and condemnation; and although they were in no degree interested in the ship,

ship, yet the event which they insured, is the safe arrival of the ship at *Marseilles*. These parties, therefore, who were interested in the cargo alone, did not insure that, but something else with which they had no concern. The goods might all have arrived safe, and the ship have been lost; and yet they would have been entitled to recover on this policy as for a total loss. And on the other hand, if the ship had arrived, and the goods had been lost, they could not have recovered, even though they would have really sustained a damage. The policy is not adapted to the real truth of the case. This then is a wagering policy, and that circumstance alone is decisive upon the ground of merits. The cases of wagering policies, and policies upon interest, have been confounded in the argument. In the latter case, if the voyage be lost, it is not necessary for the assured to proceed on with the hulk of the ship; for they are at liberty to abandon; but then there must be an abandonment in point of fact. Therefore, in this case, it is enough to say, that even if the parties could have abandoned, they have not done it. The plaintiffs have no ground for maintaining this action, either upon the merits, or upon the formal objection.

Rule discharged.

Stocks v. Booth, M. 27
G. 3. B. R.
Durnford and East, 1 V. 428.

Possession for above sixty years of a pew in a church is not a sufficient title to maintain an action upon the

Case for disturbing the plaintiff in his pew. The declaration stated, that the plaintiff had a right to this pew, without laying it to be appurtenant to a messuage in the parish.

At the trial of this cause before *Buller*, J. at the last *York* assizes, the plaintiff did not set up any claim under a faculty from the bishop, or shew any enjoyment in respect of any

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any house, but offered evidence of possession for above sixty years, and would have derived a regular title from one *Chapple*, to whom the minister and church-wardens, in the year 1711, gave their consent in writing to build the pew in question.

The learned Judge, being of opinion that this did not entitle the plaintiff to recover, directed a nonsuit, which

Bolton, Serjeant, moved on a former day to set aside on three grounds, 1st. That no faculty was necessary in this case to support the plaintiff's action. 2dly. That, if a faculty were necessary, it might be presumed after such a length of possession. 3dly. This being a possessory action, mere possession was sufficient to maintain it against a wrong doer.

Chambre now shewed cause, and contended that no title to a pew can be derived but by prescription, or by a faculty.

There is no pretence for the first; for it was stated by the plaintiff's counsel at the trial that the pew was built in 1718.

Neither is any title claimed under a faculty; but, even if there had been one to the person who built the pew, this action could not have been maintained, because that person could not have conveyed his right under that faculty. A faculty is only to the first grantee, and cannot be transferred by him. A faculty to a man and his heirs (a) is not good in point of law; for a seat in the church does not belong to the *person* but to the *house*. This doctrine is recognized in the case of *Langley v. Chute* (b), the parishioners, who repair the church and the pews in it, are entitled to seats in the church; the power of the ordinary is merely

case for disturbance in the enjoyment of it; but the plaintiff must prove a prescriptive right, or a faculty, and should claim it in his declaration as appurtenant to a messuage in the parish. A faculty to a man and his heirs is bad.

(a)
Poph. 140.

(b)
Sir T. Raymond, 246.

merely to distribute the pews among these; and does not extend further.

As to the possession on which the plaintiff relies, there can be no possession to support such an action as the present, but as belonging to the house. He was then stopped by the Court.

Wood, in support of the rule, admitted that the plaintiff in this action had not a complete title as against the *ordinary*, but contended that it was a sufficient title as against a *wrong doer*.

1st. No faculty was necessary. In *Burn's Ecclesiastical Law* (c) it is said, "if the incumbent, churchwardens, and parishioners agree that more pews are necessary, it doth not seem that there is any necessity for the ordinary's interposition." Therefore the plaintiff has made out a sufficient title under the consent of the minister and churchwardens in 1718, to build this pew.

2dly. But a faculty, if necessary, may be presumed, the plaintiff and his ancestors having had actual possession above sixty years. In *Rogers v. Brooks* (d), possession for thirty-six years was held to be evidence of a prescriptive right, though there was no evidence of a faculty from the bishop, and though the church itself had been rebuilt within forty years.

3dly. There might probably be a doubt whether the plaintiff had a right as against the *minister* or the *ordinary*. But the defendant was a *wrong doer*, unauthorised by either of these persons; and great inconvenience would result from permitting the defendant to disturb the plaintiff in the enjoyment of his pew; because the defendant himself may be evicted the next moment; and it would encourage a perpetual

(c)
Burn, 331.

(d)
M. 24 G. 3 B.R.
Vide post the
end of the case.

perpetual struggle for the possession of the pews in the church. In *Kenrick v. Taylor* (c), it was held that bare possession was sufficient against a *wrong-doer*; and that the plaintiff need not shew repairs in an action against *him*, which would have been necessary in an action against the ordinary, (which distinction was taken in 1 *Lev.* 71. and 3 *Lev.* 73.) and the Court there said, "that it was a rule of law, "that one in possession need not shew any title "or consideration for such possession against a "wrong doer." The same doctrine is laid down in *Gibbs. Cod.* 197, 8. with respect to the purpose of this action, as the plaintiff had possession he need not shew any title. Though in the case of *Kenrick v. Taylor*, it was laid as appurtenant to a messuage, yet that is not necessary; since a faculty would undoubtedly give a right, and that may be only to the person. Besides, it is said in that case in *Wilson*, that it is not necessary to prove a title as against a wrong doer: now if it be not necessary to *prove* it at the trial, it is not necessary to *alledge* it in the declaration; for the plaintiff need only alledge that which he is bound to prove.

ASHHURST, J.—In an action against a wrong doer, possession may perhaps be *prima facie* a sufficient title, and it is not necessary to set forth so strict a title as in an action against the ordinary. As in the case in *Wilson*, where it was said, that laying the pew to be appurtenant to a messuage was sufficient; that must be taken to be legally appurtenant, which can only be by prescription, or by a faculty.

But a bare possession can never give a right, because every parishioner has a right to go into the

(c)
1 Will. 326.

the church. And therefore it is the plaintiff's own fault if he does not gain to himself a complete title to a pew, which he may do, either by applying to the ordinary for a faculty, or to the minister or churchwardens to allot him a seat in the church. But if the plaintiff will not take the trouble of applying to the ordinary for a faculty, or to the minister or churchwardens to allot him a seat, he cannot maintain this action, though against a wrong doer; because he has not set forth that the pew is appurtenant to a messuage in the parish. If bare possession were allowed to be a sufficient title, it would be an encouragement to commit disorders in the church; for disputes would frequently arise respecting the possession.

BULLER, J.—This is an *action on the case*, and not an action of *trespass*. *Trespass* will not lie for entering into a pew, because the plaintiff has not the exclusive possession; the possession of the church being in the parson. The word “possession” must always be understood, *secundum subjectam materiam*: therefore in an action on the case for disturbing the plaintiff in his pew, for which *trespass* will not lie, the plaintiff must prove a right either by prescription, or by a faculty. I do not go the length which the defendant's counsel went, in saying that a faculty only extends to the first grantee; for if a faculty be annexed to a messuage, it may be transferred with the messuage to another person. And therefore if the plaintiff had declared for disturbance in a pew *as annexed to a messuage in the parish*, such a right would have been colourable, and against a wrong doer would have been sufficient. A pew may be annexed to an house by a faculty,

as

as well as by prescription, for the latter supposes a faculty. I have lately seen a faculty for exchanging seats in a church; after stating that *A.* in right of a particular house in the parish had immemorially a right to a certain pew in the church, the ordinary gave his consent to exchange it for another; but still each was annexed to the house. There cannot be a gift of a pew to a man without a faculty; it was so said in the case of *Rogers v. Brooks* (a), in which case it was laid *as appurtenant to an ancient messuage*. It was also said in the case in *Wilson*, that it must be laid as appurtenant to a messuage. But there never existed a case before the present, where the plaintiff attempted to make out a title to a pew, without laying it to be appurtenant to a messuage.

(a) Vide at the end of the case.

A faculty of a pew to a man and *his heirs* is not good; so of an aisle in the church. And Dr. Burn says (b), "No title can be good either upon prescription, or upon any new grant by a faculty from the ordinary to a man and *his heirs*; but the aisle must always be supposed to be held in respect of the house, and will always go with the house to him that inhabits it." 12 Co. 106. 2 Keb. 92. 2 Bulst. 150. 1 Sid. 88. Therefore I am of opinion that this nonsuit was right.

(b) 1 Burn's Eccl. Law, 316.

Rule discharged.

This was an action on the case tried at the summer assizes at Exeter 1783, before Perryn, B. when the Jury found a verdict for the plaintiff, damages 1*d.*

(a) *Rogers v. Brooks & Wife*, M. 24. G. 3 B.R.

A legal title to a pew may be presumed after thirty-six years possession.

The declaration stated, that the plaintiff was possessed of an ancient messuage in the parish of *Biddeford*, and that he had, *as appurtenant*

purtenant

purtenant to that messuage, the use and occupation of a certain pew in the church in *Biddesford*; and that the wife of the defendant sat in the pew, and prevented him from enjoying it, &c.

Plea the general issue.

At the trial, notice to the defendant's wife not to sit there was proved. Several witnesses swore, that above forty years ago this was an open pew; that about that time the church was pulled down; and that the rector and churchwardens, after the church was rebuilt, put the *Blinch* family (under whom the plaintiff claimed) into possession of the pew, which they had enjoyed uninterruptedly ever since, till about two years ago; when the defendants (who claimed under another messuage in the parish, called the *Winxford* estate) began to molest them. That about thirty-six years ago, the plaintiff put a lock upon the door, and lined and matted the pew. That soon after the rebuilding of the church, a woman got over the pew, as if to claim for the *Winxford* family, but she was turned out by the *Blinch* family.

One witness for the defendants swore, that the *Winxford* family sat in the pew for thirteen years after the rebuilding of the church; and she and other witnesses swore as to the pew's being common.

The Judge told the Jury that, after so long a possession as thirty-six years, they might presume a legal title in the plaintiff. The Jury without hesitation found a verdict for the plaintiff.

Motion for a new trial on the ground that there was no evidence to be left to a Jury; because from the plaintiff's own witnesses it appeared

peared that the feat was common forty years ago; and that they had proved a gift from the rector and churchwardens since the rebuilding of the church. This evidence, it was contended, destroyed the plaintiff's title which he claimed by *prescription*.

After argument by *Grose* Serjeant, and *Fanshaw* against the rule, and *Morris* and *Kirby*, Serjeant, in support of it,

LORD MANSFIELD said—The question in this case is, Whether there was *any* evidence at all to be left to the Jury?

The plaintiff's title to this pew is, that it has immemorially belonged to the house which he possessed. The defendant has set up a joint title in right of the house enjoyed by himself and another person. The plaintiff in support of his claim proved, that he was put in possession of this pew by the rector and churchwardens thirty-six years ago. The question is, Whether this act of the rector was to give possession under an *old immemorial right*, or in consequence of a *new gift*? There are strong reasons to induce us to suppose it was not a gift; they would not make a gift of that which other people claimed. *A gift cannot be made without a faculty*, and there is none in this case.

The *Winxfor*d family have acquiesced for thirty-six years, which is almost double the time which the statute of limitations requires as a bar in certain cases.

WILLES, J.—It is observable that an attempt was made to disturb the *Blinch* family in the enjoyment of their pew soon after the rebuilding of the church; but their right has been acquiesced in ever since.

One of the defendant's witnesses swore false, in saying that the *Winxford* family sat in the pew thirteen years after the church was rebuilt; for the church has only been built forty years, and the *Blinch* family are proved to have sat there thirty-six years without interruption.

It is very common when a church is rebuilt, to leave the adjustment of the pews to the rector and churchwardens; and thus I suppose the plaintiff got his pew at the adjustment in right of his messuage. But after so long a possession, I would presume any thing in favour of the plaintiff.

Per Curiam *, rule discharged.

Churchill v. Wilkins, M. 27 G. 3. B. R. Durnford and East, 1 V. 447.

Where the contract declared upon was, that the defendant should deliver to the plaintiff all his tallow at 4s. per stone, and the contract proved was, that the defendant should deliver it at 4s. per stone, and so much more as the plaintiff paid to any other person. This was held a fatal variance.

This was an action upon the case, tried before *Eyre*, Baron, at the last summer assizes at *Oxford*, in which the plaintiff declared upon a special agreement, to buy of the defendant all the fat or tallow which the defendant should have to dispose of for twelve months, from the 31st of *July*, 1784, at the price of 4s. per stone. There was a second count, stating the agreement to be, to deliver the fat or tallow at the price of 4s. per stone, and two gallons of gin to be delivered at *Christmas*, with general counts.

The agreement proved was, That the plaintiff was to give 4s. per stone, and if he gave any other person more, he was to give the same to the defendant. Upon which *Eyre*, Baron, being of opinion, that this was a material variance, nonsuited the plaintiff.

Plumer shewed cause against a rule which had been obtained for setting this nonsuit aside.

* *Buller*, J. was absent.

In order to maintain this action, the plaintiff ought to have stated in his declaration the entire contract; but he has omitted to set forth a most essential part, namely the *whole* consideration of the promise, which is now only *partially* set forth. Whether it would or would not have been necessary besides to aver performance, that is not at present material to be considered. If it had been stated generally that the defendant undertook to deliver to the plaintiff all his tallow, without expressing any consideration at all, it would have appeared to be *nudum pactum*, and therefore void. Then, if it was necessary to set out some consideration, it must be equally as necessary to set it out truly; for if the consideration proved is different from that which is laid, it is a fatal variance. The declaration should have stated the whole consideration, and then have averred that the plaintiff was ready to have paid the 4 s. *per* stone, and so much more as he had given to any other person; for if, in fact, the plaintiff had given more to any other person, that would have been a substantial defence for the defendant, which upon this occasion he was precluded from going into.

As to *Ughtred's* case (a), the distinction there taken was between conditions precedent and subsequent, and what was necessary to be averred; but that case does not say that it is not requisite to set out the whole contract. In *Cro. Eliz.* 888, where the declaration, after stating, that in consideration that the plaintiff would pay a sum of money, the defendant undertook to surrender a lease, only averred a tender of the money, without going on to say that it was either refused or accepted, the averment was held ill.

(a)
7 Co. 9.

(a)
Doug. 15.

Bower and Abbot, contra. The question is, Whether this is a disjunctive contract? Here is enough set forth in this contract to shew the plaintiff's title, and that is all that is necessary. There was no precedent condition. 1 *Lutw.* 249. *Doctr. Pl.* 91. Where two considerations are in the alternative, the party who is to perform is at liberty to elect, and need only set forth so much as gives him a right to sue. In *Laton v. Pearce* (a), the plaintiff, who sued for a penalty under the lottery act of 17 G. 3. c. 46. declared as upon an absolute agreement for £. 20. The fact was, that the contract was in the alternative, either to take £. 20. or an undrawn ticket in the lottery; but the election was in the party *sued*. There Lord *Mansfield* said, that if the option had been in the plaintiff, and he had elected to take the £. 20. the contract would have been sufficiently stated, because he would thereby have converted the agreement into an absolute contract for the payment of the money; and then the other part of the alternative in the original bargain would become surplusage. Here it was in the power of the plaintiff to elect whether he would give more than 4 s. *per* stone to any body else; and having elected, he reduced the contract to a certainty; and then the whole is set out, and there is no substantial variance between the contract laid, and that proved. If a contract is variable upon a contingency which does not happen, the original contract becomes absolute.

This case may be considered in another view. The contract in effect is, that the plaintiff will buy of the defendant all the tallow at a certain price, *provided* that, if he gave more to any body else, he would give the same to the defendant.

defendant. Then how is the defendant precluded by this declaration from entering into the nature of his defence? It is enough for the plaintiff to shew that part of the contract which he is to perform, and upon the trial the defendant may take advantage of the proviso by way of defence.

As to the cases which make a distinction between conditions precedent and subsequent, they are not applicable to the present; for here nothing more was to be performed by the plaintiff. He could not have proved that he had not paid more than 4 s. *per* stone to any other person; therefore it was not necessary to alledge it, because it would have been averring a negative.

ASHHURST, J.—This nonsuit is proper. It was incumbent on the plaintiff to state his case truly. But the contract, as stated, is different in sense from that which is proved. For a contract, that the defendant shall deliver all his tallow *at a particular price*, is not the same as a contract, that he shall deliver it at that price, *or at a greater*, on the happening of a particular event. The plaintiff should have stated the whole, and then have averred that he had not given more than 4 s. *per* stone to any other person, and that he was ready to have paid that sum.

As to the case of *Laton and Pearce*, it does not appear to me to contradict that principle.

BULLER, J.—I wish to have an opportunity of looking into the case of *Laton and Pearce*, before I finally decide this. But laying that out of the question for the moment, (for I think it will not be found to apply) this case admits of no difficulty.

This is an action on a special agreement. The agreement is the gift of the action, therefore it must be stated truly. And this does not clash with the principle drawn from the cases cited by the plaintiff's counsel, which says that the plaintiff need not set forth different parts of an agreement which are not essential to the right of action; for here the contract proved is different in substance from that which is alledged. For the declaration states, that the plaintiff was at all events to pay *only four shillings*, whereas the contract proved was, that he was to pay *so much, or something more*, as events might happen. They differ therefore in this respect; the agreement stated in the declaration is for a particular price *absolutely*, whereas that proved is for the sum stated in the declaration, *or some other price conditionally*.

This is not the case of an alternative contract; where the party has his option to do one thing or another, but it depends upon a contingency; because according to some future event it is a contract for a greater or a less sum. Therefore the term *alternative* is improperly used here. Neither is this like the question in *Ughtred's* case. But the question here is, Whether the plaintiff must not state the contract as it is? and whether he can state a contract as absolute, when, whether it is absolute or conditional, depends on the event of another fact.

I will look, however, into the case of *Laton and Pearce*, and if it makes any difference in my opinion, I will mention this case again.

Rule discharged.

On

On the next day, *Buller*, J. said, that the case of *Laton* and *Pearce* was rather against the plaintiff than otherwise: for the Court, in that case, held the variance to be fatal. But he observed that that was an *alternative* contract.

This action, which was brought against the defendant upon the 11 *Geo. 2. c. 19. s. 12.* for secreting an ejectment, was tried at the last *Leicester* assizes, before *Heath*, J. when the plaintiff was nonsuited. It appeared that in 1785, the premises being in mortgage, and the mortgage forfeited, the defendant (who was tenant to the plaintiff) had agreed, in a conversation which he had with the attorney of the mortgagee, to attorn to him from that time; but the attorney, not thinking the promise sufficient, delivered to the defendant an ejectment in *April* 1785, informing him at the same time, that it was only for the purpose of procuring a written attornment, and that it would not be prosecuted further; in consequence of which, the defendant actually attorned to the mortgagee. He gave no notice to the landlord, either of the ejectment or of the attornment; for omitting the former of which, this action was brought. The learned Judge being of opinion that this case did not come within the statute, nonsuited the plaintiff; which nonsuit,

Balguy now moved to set aside; contending that the secreting of this ejectment was productive of some of the inconveniences which the act intended to remedy, because by these means the mortgagor had been prevented applying to this Court to stay the proceedings

Buckley v. Buckley, E. 27 *Geo. 3. B. R.* *Darnford and East*, 1 V. 647.

A tenant to a mortgager, who does not give him notice of an ejectment brought by the mortgagee, to enforce an attornment, is not liable to the penalties of the 11 *Geo. 2. c. 19. s. 12.* for secreting ejectments.

of the ejectment on paying the principal, interest, and costs.

The COURT however were of opinion, that this case did not come within the statute; for that it only extended to cases where ejectments were brought which were inconsistent with the landlord's title. They observed likewise that the ejectment was brought for the purpose of compelling the tenant to attorn to the mortgagee, which the act expressly permitted him to do.

Rule refused.

Smith v. Chester, E. 27 G. 3. B. R. Durnford and East, 1 V. 654.

In an action against the acceptor of a bill of exchange, it is necessary to prove the hand-writing of the first indorser, notwithstanding such indorsement was on the bill at the time it was accepted.

Indorsee of a bill of exchange against the acceptor.—It appeared at the trial before *Buller, J.* at the last sittings at *Westminster*, that when the bill was accepted, there were several indorsements on it. But the plaintiff, not being able to prove the hand-writing of the first indorser, was nonsuited.

Bower now moved to set aside this nonsuit, on the ground that as these indorsements were on the bill, at the time of the acceptance, they must be taken to have been admitted by the drawee, and he could not afterwards dispute them; and he cited in support of this, a determination of Lord *Mansfield's* in the case of *Pratt* against *Howison*, at the sittings after *Trin. term*, 23 G. 3. at *Guildhall*, and another case in *Sayer*, 223. observing that there would be great hardship in the case of foreign bills of exchange in many instances, on account of the difficulty and inconvenience of proving the hand-writing of the first indorser, who may be unknown to the holder.

ASHHURST, J.—The law has been otherwise settled; and if it were not so, there would be no difference in this respect, between bills payable

payable to order, and those payable to bearer, And it would open a door to great fraud.

BULLER, J.—This point was much considered in a late case before this Court, when they were perfectly clear, that an indorsee of a bill of exchange, in an action against the acceptor, was obliged to prove the hand-writing of the first indorser. For when a bill is presented for acceptance, the acceptor only looks to the hand-writing of the drawer, which he is afterwards precluded from disputing; and it is on that account that an acceptor is liable, even though the bill be forged.

GROSE, J.—This matter appears extremely clear; for a bill of exchange is no payment to the person in whose favor it is drawn, unless it is indorsed by him.

Rule refused.

In this action against the defendant for negligence as an attorney, the declaration stated, that the plaintiff's intestate had retained the defendant to prosecute one *John Schultze* for £.625, due on a bond; and that the defendant had promised diligently to prosecute the said suit, &c. It then stated that afterwards, to wit, on 24th of *January* 1785, the defendant sued and prosecuted a bill of *Middlesex*, returnable on *Monday* next, after fifteen days of *St. Hilary*, and delivered it to the sheriff, who made his precept, under which *Schultze* was arrested, and detained by him, 'till the said *Schultze* afterwards and before the return of the said precept, to wit, on 31st of *January* in the year *aforesaid*, was in due manner committed to the custody of the marshal, &c. that though the said defendant, whilst the said *Schultze* was in custody, &c. to wit, in *Easter*

Green v. Rennett, E. 27 G. 3. B. R. Durnford and East, 1 V. 656.

In an action against the defendant for negligence as an attorney, in not prosecuting a debtor of the plaintiff's to judgment; the return of the writ on which the debtor was arrested being laid to be in the 25th year, &c. and the writ itself appearing to have been returnable in the 24th year, &c. this was held to be a fatal variance, even though the day of the return

term

was alledged in
the declaration
under a videlicet.

term in the year aforesaid might, and ought to have obtained and signed a judgment against the said *Schultze* for the said debt, yet the defendant well knowing, &c. did not truly and diligently prosecute the said suit, &c. and did not then, or at any time whatsoever, obtain or sign any such judgment therein; by reason whereof the said *Schultze* afterwards, to wit, on the 4th of *November 1785*, was in due manner superseded and discharged, the said debt being wholly due and unpaid.

The writ was in fact sued out on the 24th of *January 1785*, but by a mistake it was indorsed on the 24th of *January 1784*. At the trial of this cause before *Buller, J.* at the last sittings at *Westminster*, on the production of the writ, it was objected that there was a material variance between the writ and the declaration, the writ itself appearing on the face of it to have been sued out in *January 1784*, but that was over-ruled; but the learned Judge being of opinion that *the return of the writ* was material, and there being a similar variance in that respect, nonsuited the plaintiff.

Gibbs now moved to set aside this nonsuit, contending, that as this was an action against the defendant for negligence in not prosecuting a person to judgment, it was equally immaterial when the writ was returnable, as when it was sued out. That the damage to the plaintiff, which was the gist of the action, was precisely the same, at whatever time it was returnable. Supposing the defendant had sued out a void writ, the action would have lain; therefore, if it be immaterial whether the writ be good or not, the return of it must be equally so. At all events, it may be rejected as coming under a *videlicet*. He then cited a case of

Nichols

Nichols qui tam v. Bamfylde, at *Bodmin summ. ass.* 1784, before *Hotham*, Baron. It was an action of debt on the stat. *Wil.* 3. against an excise-officer for soliciting a vote at *Mitchel* for the late election. The declaration stated the writ and delivery to the sheriff; and that he afterwards, and before the return thereof, to wit, on the 4th of *April*, made his precept in writing. The evidence was of a precept dated 1st of *April*. *Grose* objected to it as a variance, with which Baron *Hotham* concurred, and nonsuited the plaintiff. A motion was made the ensuing term in the Court of Common Pleas, to set aside the nonsuit, and grant a new trial, which was accordingly granted, that court entertaining no doubt on the question.

But in this case *the Court* were all of opinion, that the time when the defendant ought to have charged *Schultze* in execution depending on the *return* of the writ, *the return* became material, and therefore the variance was fatal.

Rule refused.

In this action of trover, which was brought to recover a box of money, *Heath*, J. before whom it was tried at the last assizes at *Nottingham*, nonsuited the plaintiff, on the ground that one tenant in common could not maintain an action of trover against another. The circumstances were these; the plaintiff and defendant, *Camsell*, were members of a friendly society, which was instituted for the purpose of relieving each other in case of sickness or other disability. The fund for this purpose was levied by weekly contributions from each of the members; and the aggregate sum was kept in a box which was deposited in the plaintiff's

Holliday v. Camsell and White, E. 27 G. 3. B. R. Durnford and East, 1 V. 658.

A member of an amicable society intrusted with a box, containing the fund, and bound by bond to keep it safely, cannot maintain trover against another member, and a third person, who take it from him.

tiff's house, who was an innkeeper; and a bond was given by him for the safe custody of it. *Camsell* got possession of this box, carried it away, and delivered it to the other defendant *White*, who was not a member of the society.

Galley moved to set aside this nonsuit, and contended that the plaintiff had a *special* property in the box, exclusive of any right which the defendant had in it; for the box with its contents was lodged in the plaintiff's hands by the club, and he had given security for the safe custody of it. But the defendant had no other interest than a mere contingency in the event of his sickness, and then only in a certain proportion. No person therefore had any right as against this plaintiff, but the majority of the club, by whom alone he could be released from his obligation. Besides, the rule of law, that one tenant in common cannot maintain an action of trover against another, does not apply in cases where the possession of that other is tortious. And here the defendant has no right whatever to keep possession of the box against the consent of the plaintiff.

ASHHURST, J.—The rule of law is undoubtedly true, and applies to this case. All the members of this society have a joint property in the box and its contents; they are therefore tenants in common, and one tenant in common cannot maintain trover against another.

BULLER, J.—It is here admitted, that one of the defendants was a member of this society, and consequently had a general property in the box; at any rate therefore a special property cannot give a right in this action against a general property. The *custody* only is committed

mitted to the plaintiff, the *property* remains in the society.

GROSE, J. of the same opinion.

Rule refused.

Assumpsit against a common carrier for not safely carrying and delivering goods sent by the plaintiffs. The declaration stated, that the defendant undertook to carry the goods "for a certain hire and reward, to be paid by the plaintiffs." It was proved at the trial, that Clarke, the consignee, had agreed with the plaintiffs to pay the carriage of the goods, which the defendant's counsel contended did not prove the declaration. And

BULLER, J. before whom the cause was tried at *Guildhall*, being of that opinion, nonsuited the plaintiffs.

Law had obtained a rule on a former day to shew cause why the nonsuit should not be set aside on the ground that the allegation, that the hire was to be paid by the plaintiffs, was immaterial, and that in all cases of this kind the contract was virtually made between the carrier and the sender of the goods. That no private agreement between the consignor and consignee could vary the question as between the consignor and the carrier. That, though the consignor might have parted with the property in the goods, he might maintain an action against the carrier. *Davis Jordan and James, 5 Burr. 2680. Vale v. Bayle, Cowp. 294.* but at all events, the consignor might be considered as the agent of the consignee for the purpose of bringing this action.

BULLER, J. on this day said, that on considering the question, he found he had been mistaken in point of law; for, that, whatever

Moore and others v. Wilson, E. 27 G. 3. B. R. Durnf. and East, 1 V. 659.

In an action by the consignor of goods against a carrier for non-delivery, where the plaintiff averred, that the defendant undertook to deliver, &c. in consideration of the hire to be paid by the plaintiff, proof that the hire was to be paid by the consignee was held to be no variance, the consignor being by law liable.

might be the contract between the vendor and the vendee, the agreement for the carriage was between the carrier and the vendor, the latter of whom was by law liable. And the other two Judges being of the same opinion, the rule was made absolute without farther argument.

Rule absolute.

King v. Pip-
pett, E. 27
Geo. 3. B. R.
Durnford and
East, 1 V. 695.

Where the defendant carries down the record by proviso, it is sufficient if he obtain the usual rule for trial by proviso any time before trial, even though it be obtained after he has given the plaintiff notice of trial.

(a)
Durnford and
East, 492.

It having been determined in last *Michaelmas* term (a), that the defendant was not entitled to sign judgment as in case of a nonsuit in this cause, because he might have carried the record down to trial, at the last summer assizes, by proviso, the defendant, on the 8th of last *March* (the commission day being the 19th) gave notice of trial, and on the 10th of *March*, obtained and served the usual rule for a trial by proviso; and the plaintiff, not appearing at the trial according to this notice, was nonsuited.

Law now moved to set aside this nonsuit, contending, that the notice given by the defendant was irregular for want of the antecedent rule to support it. 2 *Stra.* 1055.

Gibbs was to have opposed it in the first instance; but *the Court* said, that, according to the old established practice, wherever the defendant carries down the record to trial by proviso, he must obtain a rule, that in case the plaintiff should make default, he might be at liberty to go to trial. But the only use of that rule is, that if two records are carried down to trial (the one by the plaintiff, and the other by the defendant) the former only should be tried. Then it is quite sufficient if the defendant has this rule at the trial. Besides, no inconvenience can result to the plaintiff from

this practice; because, if the defendant does not carry down this record to trial after notice, he is liable to pay the plaintiff his costs.

And the master of the Crown-office informed the Court, that in criminal trials, where the defendant carries the record by proviso, no such rule is obtained at all.

Rule refused.

IX. Of other Matters respecting new Trials, &c.

(17.) Of Costs on new Trials.

Vide ante III. The *Queen v.* the Bailiffs, &c. of *Bewdley*, and IV. *Tamplin* and *Vorsell*.

Mason v.
Skurray. T. 20
G. 3. B. R.
Doug. 421.

Where a new trial has been granted and nothing was said in the rule concerning the costs of the first, although the same party succeeded on the second trial, he shall not have the costs of the first.

ACTION on a policy of insurance; verdict for the defendant; new trial granted; and a second verdict for the defendant. The rule for a new trial had not been drawn up, "upon payment of costs," nor had the costs been reserved. On *Saturday* the 27th of *May*, *Cowper* obtained a rule to shew cause why the defendant should not be allowed the costs of the first trial.

Dunning now shewed cause.

Lord Mansfield absent.

The Court said, as nothing had been said about the costs of the first trial in the rule, and they had not been reserved to abide the event of the second verdict, the defendant was not entitled to receive them.

The rule discharged.

IX. Of other Matters respecting new Trials, &c.

(18.) Of Privy Verdicts.

Vide post, Essay IV. Gay v. Cross.

IN *quid juris clamat* the tenant said, that he had held in tail of the gift of one *A.* The plaintiff said, that *A.* did not give; upon which they were at issue, and the *nisi prius* was in the county of *North*, where before *Dyer*, and *Benlowe*, the inquest was charged upon the said issue; and the Jurors departed from the bar, and after the rising of the Court, they came again before the Justices, and gave a privy verdict for the defendant, and had leave to eat and drink; and afterwards, at another day, when the Court was sitting, they came again, and gave their verdict openly for the plaintiff.

T. 3 Eliz.
Mo. 33. n. 108.
Privy verdict
for the de-
fendant, public
verdict contra
for plaintiff.

Jurors eating
and drinking.

And all this matter was entered upon the *posse*. And at the day in bank, the question was, for which of the parties judgment should be given? And the opinion of all the Justices was, that judgment should be given for the plaintiff; for the last verdict which was given openly in Court is the verdict in fact, and not the first; for upon a privy verdict before the Justices none of the parties shall be demanded; and if one of the jurors dies between the first verdict given, and the second, or if the judge die, the verdict taken before is void:

and yet neither the one nor the other, after the second verdict given shall hurt, but judgment shall be given. So also if the next day, the jurors will not say any thing, the acceptance of the privy verdict shall be nothing to the purpose, for the giving of this verdict is only suffered for the ease of the jurors. And it is said per *Dyer*, that eating and drinking before the giving of the second verdict, shall not make the verdict void, because it was by licence of the justices, and it was also at their own costs. And although the jurors, before giving their verdict, eat and drink, yet this shall not avoid the verdict, unless it be at the costs of one of the parties; for if it be at the cost of the jurors themselves, it is not material, as was lately adjudged in the case of one *Powleskin*, of *Cornwall*.

And *nota*, That *Brown* moved in this case what judgment the plaintiff should have, if to recover the land or not: for upon such claim it is clear, that the defendant had forfeited the land; and for such claim, the grantee, as it seems to me, may enter immediately without more: but if judgment shall be given to recover the land, I have never seen any precedent.

As to the
jurors eating
and drinking.

Moor, 33.

IX. Of other Matters respecting new Trials, &c.

(19.) Of a *Distringas* or *Venire facias de novo*.

Vide ante III. *Bro. Ab. tit. Verdict*, 17, 18.

IX. (3.) *Rex v. Woodfall*, IX. (10.) *Ed-
dowes v. Hopkins*; *et post*, *Essay V*.

BEFORE we proceed to cases of *Venire facias de novo*, after trials, we shall state from 1 *Brownlow*, some particulars worthy notice, respecting *mesne*, and *jury process*, &c. as the law stood at the beginning of the reign of *James* the first.

In trespass the process is attachment and distress infinite, but if *nihil* be returned, process of outlawry lies; and if the defendant be returned attached by his goods and chattels, if he omit to cast an essoin at the return of the writ of attachment, he shall forfeit the goods by which he was attached; but if he cast an essoin, he shall have a special writ (reciting the matter) to the sheriff, to deliver to him his goods or cattle, although he do not appear at the day of adjournment of the essoin: and if the defendant at the return of the attachment will appear without an essoin, he may, and then he shall not forfeit the goods: and note, the essoin shall not be adjourned by, from fifteen days to fifteen days:

S 2

and

M. 2 Jac. 1.
Brownl. 193.
Of jury pro-
cess, challenges,
*venire facias de
novo*, &c.

and if the original writ be against many, they shall have but one essoyne in personal actions: and if a lord of the parliament appear not, he shall forfeit an hundred pounds; and upon issue joined in this action, the process against the jury, is the *venire facias*, *habeas corpus*, and *distress*: and if a baron of the parliament be a defendant, then if a knight be not returned upon the pannel, the defendant may at the assizes quash the pannel; and if at the assizes the jury do not appear full, to wit, twelve men, this may be supplied by the justices at the request of the plaintiff, and the sheriff ought to return two hundreders, at the least, in this action, and so in every personal action: but four in real actions, for if a challenge be made *pro defectu hundredorum*, if two be not returned, the jury shall remain; and a *distringas*, with a *decem tales* shall be awarded, returnable in court, but no *circumstantes* shall be awarded in court, for if the jury in court do not appear full, or are challenged, for that the jurors have no freehold, and it be tried, a new *habeas corpus* shall issue out with a *decem tales*, if it be desired: and if the jury appear full in the court, and the array be challenged, either for that it was of the plaintiff's nomination, or that the sheriff or under-sheriff, who returned the jury, is of the kindred of the plaintiff, or any other principal cause of challenge, and this is confessed or tried by two of the jurors who have appeared, being assigned and sworn by the court to be triers of the challenge, who shall give their verdict that the challenge is true, then the array shall be quashed; and if he that arrayed the pannel remain sheriff, the *venire facias de novo* shall be awarded to the coroners, if there be no cause

of

of exception against them, or any of them by reason of kindred, or any other principal cause: and if there be cause of challenge to any of them, the *venire facias* shall issue to the rest, and his companion shall not intermeddle with the execution of it; and if there be good cause against all, then a *venire facias* shall issue to *essizors* to be appointed by the court to return the writ, but if the sheriff who returned the first pannel be removed, then a new *venire facias* shall issue to the sheriff who shall be then in office: and note no challenge shall be made to the array returned by the *essizors* but to the poll: and if the jury appear full, and no challenge be made until twelve be sworn, the jury shall proceed to hear their evidence, and give their verdict; and if the jury find for the plaintiff, then they shall give costs and damages, but if they find for the defendant, they shall find neither costs nor damages: and the judgment for the plaintiff is, that the plaintiff shall recover his damages found by the jury, and costs of suit; but if the jury find for the defendant, the judgment is, that the plaintiff *nil capiat per breve*; but if judgment in this case had been by *nil dicit*, *confession*, or *non sum informat*. then the court shall award to the sheriff a writ to enquire of damages, and no challenge lies to the jury upon a writ to enquire: and if the sheriff return but twenty and one upon the jury, and twelve of them appear, and try the issue and give a verdict, it is a good verdict; but if only ten or eleven of them appear, and the jury be made up at the assizes, *de circumstantibus*, and the issue be tried, and a verdict given, it is naught, and not holpen by the statute: and if the issue be joined, and the sheriff be cousin to the defendant, the plaintiff shall not have a *venire*

facias upon the challenge of kindred of the sheriff to the defendant, but it ought to stay until that sheriff be removed and another sheriff made: and if the defendant be lord of the hundred, within which hundred the ten doth arise, the plaintiff may shew that, and have a *venire facias* to the next hundred; or if the array be quashed for that cause, he may have a *venire facias* to the coroners of the next village in the next hundred next adjoining: and note, the *venire facias* shall not issue to the coroner but upon the principal challenge; and if a challenge be to the *tales*, and that be found true, the *tales* only shall be quashed, and the principal pannel shall stand: and if an issue be joined between the mayor and commonalty of a city, and another concerning a trespass done within that city; the plaintiff surmising that the sheriff and coroners are citizens of that city, may pray a *venire facias* to the next county, or the body of the county, or of the next villages in the next county: and if the challenge of kindred be not rightly alleged in the challenge, it matters not if it be kindred; and if a *venire facias* be quashed, because it was returned by the under sheriff, who was kin to him, or other good cause, it shall be quashed, and the *venire facias* shall be returned by the high sheriff, with words in it, that the under sheriff shall not intermeddle with it: and if the array be challenged and affirmed, the defendant may after challenge the poll, and must shew his cause of challenge presently: and if the land in question lie in four hundreds, if four of any hundred appear, it is good; and note, that the challenge of the array shall be drawn in paper, and delivered presently after the jury appears; and the defendant is not bound to make good his challenge

lenge with these words, *Et hoc parat. est verificare, &c.* And those that try the principal challenge may also try the challenge upon the *tales*. If the king had been party alone, no challenge was to be allowed, but if the suit had been in the name of another, who sued as well for the late king as for himself, in a writ to enquire of waste after a distress, no challenge to the poll lies.

It is good cause to challenge a juror because he was attainted in a conspiracy or attain, or if any juror was put into the pannel at the desire of the party, it is good cause of challenge to the array: and if a jury be of two counties, and both arrays are challenged; two of one county shall try the array of that county, and two of the other county shall try the array of the other county; and they shall not join until they be sworn of the principal, and two of one hundred, and two of the other hundred do suffice. If in trespass the defendant justify as a servant to the lord, and by his commandment, it is good cause of challenge to the juror, that he is a tenant to the lord although the lord be no party to the record; and if process by challenge is awarded to the coroners, the process afterwards shall not go to the sheriff, although there be another sheriff, but after judgment execution shall issue to the new sheriff: and where a man challenges the polls of the principal pannel, he afterwards shall not challenge the array of the *tales*, and if the array be quashed, it is entered upon record, but if it be affirmed, then it is not entered. If trespass be done in divers towns in one shire, they may all be joined in one writ, to wit, why by force and arms the closes and houses of the plaintiff at A. B. and

C. the defendants have broken: and, &c.

A *tales*, &c. may be granted at the prayer of the defendant.

No fee shall be taken on return of a *tales*.

The *tales* to be of jurymen returned on other pannels.

Two hundreders appearing shall be sufficient.

No challenge to the array for want of a knight.

After a *venire* returned, if the cause is not tried, a new *venire* may be sued out.

A great variety of other provisions respecting juries, have been made by several statutes, not necessary to be here farther noticed. *Vid. Tab. to Stat. tit. Juries. Vide post* at the end of the case, next but one.

Stat. 14 Eliz.
c. 9.

Stat. 4 and 5
W. and M.

c. 24. § 20.

Stat. 7 and 8

W. 3. c. 32. § 3.

Stat. 27 Eliz.

c. 6. § 5.

Stat. 24 G. 2.

c. 18. § 4.

Stat. 7 and 8

W. 3. c. 32.

Laxworth v.
West, Mich.

3 Jacobi.

1 Brownl. 203.

Trespas, two
issues, the sub-
ject of which are
in different
places. *Venire*
mis-awarded.

Trespas brought for the taking of hay feyered from the ninth part of *Elthorp*, in the county of *Warwick*, the defendant to *part* pleads *Not Guilty*, and to the *residue* pleads a *devise* of the parsonage made by *Lepworth* to the defendant at *Wapenbury* in the same county, and to enable the devise for tithes in *L.* alledges *L.* to be a hamlet at *Wapenbury*, to the intent that the whole tithes may pass: and upon a *non devisavit*, the *ven.* was of *Wapenbury*, and found for the plaintiff, that *T. L.* did not devise it, and the other issue of not guilty found for the defendant, and moved in arrest of judgment, that the *venue* was mistaken, because it was of *Wapenbury* only, and not of *Elthorp*, and they of *W.* could not try a matter in *E.* and although it was answered, that the defendant himself by his plea had confessed that *E.* was but an hamlet, yet the Court held the *venue* mistaken; for when the

plaintiff

plaintiff declares of a trespass in *E.* this by general intendment is presumed to be a village: of which village the matter which is there in question ought to be tried: and although the defendant had alledged *Eltthorp* to be an hamlet; yet it was but to enable the devise, and doth not extend to the issue before joined upon the not guilty for part; for in that issue both parties agree that *Eltthorp* is a village, and it is a perfect issue taken, which hath not any coherence with the other issue of *non devisavit*: but if the defendant had to the whole issue pleaded the devise as his excuse, and had alledged *E.* to be an hamlet of *W.* and that only had been in issue, there the *venue* awarded had been good of *W.* only; but in this case it was adjudged that the *venire* was mis-awarded, and that the plaintiff should have a *venire facias de novo*.

An action of trespass brought for breaking the plaintiff's close called *G. in Woodthorpe*, in the county of *Derby*, to the damage of, &c. The defendant pleads that the close was known as well by the name of *G.* as by the name of *D.* and that it was and had been, time out of mind, parcel of the manor of *Wigenworth*; and pleads his freehold in the manor: the plaintiff maintains his declaration, and traverses that the place where, &c. was parcel of the manor, and upon this they are at issue, and a *venire facias* awarded of *Woodthorpe* only: and moved in arrest of judgment by the defendant, the verdict being for the plaintiff, and urged that it was a mistrial, for the *venire facias* ought to have been as well of the manor, as of *Woodthorpe*; for although the parties be agreed, that the place

where

Kniveton v. Roylie, M.

8 Jacob.

1 Brownl. 218.

Trespass, liberum tenementum in the manor of Wig. venire of Wo. venire ought to have been of both—Venire facias de novo.

where the trespass was committed lies in *Woodthorpe*, yet that being supposed indeed to be parcel of the manor of *Wigenworth*, the *venue* of the manor by intendment have a more perfect and better knowledge of it than the village of *Woodthorpe* only; which was agreed by the whole Court, and a new *venire* awarded to try the issue again.

What the law *was*, hath been already shewn under this head.

Now as to the *venire facias*, by statute 4 *Ann. c. 16. s. 6*, every such writ for the trial of any issue in any of the cours of record at *Westminster*, shall be awarded of the *body* of the proper *county* where such issue is triable. But *per s. 7.* not to extend to writs of *appeal* of felony, murder, &c.

Perriman v.
Pierce, M. 20
Jac. B. R. Palm.
303.

Construction
of the words
proximo con-
sanguinitatis de
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devisor in a de-
vise.

In *ejectment* the Jury found a special verdict to this effect, that one *Harpur* was seised of foccage land (in question) in fee, and had issue eight daughters, and one son, by three several *venters*; and that he devised this land to *Catharine* his youngest daughter by the last *venter*, for life, remainder *proximo de sanguine*; remainder in tail to *William* his son by the same *venter*, and if he should die without issue of his body, remainder for life to two others of his daughters by the middle *venter*, remainder *proximo consanguinitatis de sanguine* of the devisor. The devisor died: *Joan*, the eldest daughter, to whom nothing was given by express name by the will, died, having issue *John* and *William Perriman* the lessor of the plaintiff; and they only found generally, that *Joan* had *John* and *William*, that *William* entered claiming with his brother, as *proximus de sanguine*; but they did not find that *John* was the eldest

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eldest son, or that he was heir: they found that *William* the son of *Harpur*, to whom the tail was limited died without issue, and that all the daughters died without issue, but the two daughters, who were advanced by express estates in the will, and except the eldest daughter, who had issue the said *John* and *William*, and if upon the whole matter, &c. And the question was who should have the land by the words *proximo consanguinitatis de sanguine* of the devisor; *scil.* the issue of the eldest only, or the issues of all the daughters, or the second son of the daughter *Joan*: the eldest daughter had issue *John* and *William*: *John* had issue the lessor of the plaintiff; if he being her grand-child, shall have before the son of the eldest daughter, or if the eldest shall be said to be nearer, than the son of the son of the eldest: and it was argued by *George Croke*, that the son of the son of the eldest daughter should be preferred. 1. He said, that the issues of those, who are advanced by express estate, are excluded from taking any implied estate; also *proximus de sanguine* in legal construction is the eldest; and for this he urged 30 E. 3. 27. 30. *Aff.* 47. Also all the daughters may not take *here*, for the singular word *proximo*, which excludes all multiplicity in wills, as 1 Co. *Archer's case*, *proximo heredi*; and he applied to this purpose *Chapman's case*, 18 Eliz. *Dyer*, where the eldest of the family was preferred; and *Clacke's case*, 16 Eliz. and 1 Eliz. *Frencham's case*; where a special estate limited, excludes a general estate implied; as if it be given to a *feme durante viduatate*, and after her death, remainder to a stranger, this does not give an estate for life to a *feme*.

Bridgman

Bridgman and *Trotman contra*, because all the daughters are in equal proximity of blood to the devisor, as 5 *E.* 6. for having letters of administration; and 3 *Co.* *Ratcliffe's* case; also the mother of *Perriman* was dead before the remainder fell, and because the two sons are nearer to the devisor, than the son of the eldest son of *Joan Briton*, 189, saith, that the second daughter shall elect before the issue of the eldest daughter, with which agrees 30 *E.* 3. 25. and *Bracton* saith, *quod nomine heredis includitur tota posteritas.*

And so of daughters, the eldest shall have all.

And after several motions, it was resolved by *Dodderidge*, *Houghton*, and *Chamberlaine*, that judgment should be given for the plaintiff (*absente Lea*, Chief Justice) but they did not agree in the reason of this resolution; *Houghton* held, that if one hath issue three sons, and devises to the youngest in tail, *remanere proximo consanguinitatis*, that the eldest shall have all, because the word *proximo* declares the intent of the devisor, that one only shall have, admitting that they are in equal proximity of blood; and to this reason *Chamberlaine* agreed; and he said, that so it was held in *Levet's* case, 25 *Eliz.* by all the Justices; and *Chapman's* case *supra*; and he said that the diversity was there taken, when the words are *propinquioribus*, that there all shall take; but *aliter* when it is limited *proximo*: which was denied by *Dodderidge*; because there is not any diversity between *nearer* and *nearest*, any more than between *no* and *not*; also *Houghton* said, that if one hath three sons, and the eldest is attainted, and land is devised to the youngest, remainder *proximo de consanguinitate*, that the king shall take all: *Dodderidge contra*; but in such case their issue shall have it; for although the bond of

of marriage is gone, and the blood corrupted for producing heritable issue, yet they may take by purchase, because they are of his blood; but *Dodderidge* held, that all the daughters, and the sons also in case of purchase and construction of the will, are as near in blood, and they shall equally enjoy the land purchased; for the blood of the youngest issue, in nature, is in the same degree with the blood of the eldest; but *aliter* it is in the case of descent; but the reason of this is drawn from the general custom of the realm, which conveys the land by descent to the eldest only; but this also is grounded upon the law of God, that the eldest, who opens the womb, shall be sanctified to God, and shall be deemed by sacrifice; *aliter* of *femes* as appeared with respect to the daughters of *Selaphead*; but by him, although the daughters are in the same proximity, yet the youngest son of the devisor is nearer to him than the son of the son of the eldest daughter; but by him and *Houghton* and *Chamberlaine* this is not the case here, for the eldest daughter herself survived the devisor, so that the remainder and interest was vested in *her*, although it was not executed in possession until after her death, by the death of the tenant in tail without issue; so that afterwards it *went* in descent to her heirs, and not by proximity of blood to the devisor; so that he held that the eldest daughter should take but an equal portion with her sisters; but in this case it appeared upon the record that all the daughters died without issue *scil.* the eldest, to whom no estate was given by name in the will; and the two daughters, who had express estates by it; and he held, that this express estate excluded them, and their issues from

The reason why the eldest son is preferred to all others, by descent.

from taking any other estate by implication; and so all fell upon the eldest daughter; to which *Chamberlaine* agreed; but *Houghton* denied this reason, because this did not exclude their issue; so that they all agreed that the issue of the eldest daughter should have the whole of the land, and commanded that judgment should be entered accordingly for the plaintiff: but the counsel for the defendant shewed, that the special verdict was uncertain in point of title, upon which no judgment could be given: for they found that *Joan* the eldest daughter had issue *John* and *William*, and that *William clamando* as *proximus de sanguine* of the devisor, entered with his brother: and did not find that *John* was the eldest son or heir to *Joan*, and in point of title it shall not be intended that he is, although that he is first named; but when it is said that *William clamando intravit*, this increases the uncertainty, and the Court cannot ground their judgment upon an intendment who is heir, and that the remainder vested in *Joan*, and this is conveyed by descent to her heir, which doth not, by this verdict, appear to be the plaintiff; and so he cannot have judgment; and for this reason the Court would not give judgment; but awarded a *venire facias de novo*: but they declared their opinion upon the matter of law.

Special verdict finds plaintiff had issue two sons, but does not find which is eldest or heir.

Uncertainty.

Venire facias de novo.

Young v. Englefield, T. 21 Jac. B. R. Palm. 378.

Variance between the roll and the nisi prius record.

In *trespass*, the plaintiff alledged the trespass in two acres, which abut upon *Gray's-Inn-Lane*; but the *nisi prius* record recited the abuttals upon *Graves-Inn-Lane*; and for this variance between the *nisi prius* and record here, *Crook* moved to have a new *distringas*; for that what had been done at the affizes was

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void, and without warrant; and he cited a precedent in this court, *Trin. 9 Jac. Ret.* 430. between *Fartbing* and *Dupper*, that the *nisi prius* for variance from the record here, in this that the *nisi prius* recited 6 *menses*, where the record was 6 *septimanas*, was adjudged without warrant and void. And inasmuch as it appeared that this precedent was upon deliberation, it was ruled by *Lea, C. J.* and *Dodderidge, J.* that the plaintiff should have a new *distringas*, although he was nonsuited at *nisi prius*; for this was without warrant and so no nonsuit: but if original process or other process be erroneous, yet it is a record: but the *nisi prius* was but a transcript from the record. *Houghton, J.* held, that it was a record, although erroneous; and said that it was against the precedent: but it was resolved as above according to the precedent.

If a verdict be imperfect, it shall not be rectified by the same jury, but a *venire de novo* must issue. R. 2 Cro. 210.

If there are several issues, and a verdict good as to one, and imperfect as to others, a *venire facias* goes to all. R. 2 Rol. 722.
l. 45.

So, in an action against several, if the verdict is good as to some, imperfect as to others, there shall be a *venire facias de novo* as to all, and a defendant found not guilty, may afterwards be found guilty. R. 2 Rol. 722.
l. 35. 2 Cro. 627.

So, if there be a demurrer to part, and issue for part, and the verdict does not find damages for the matter in the demurrer, it is wholly void. Dub. 2 Rol.
723. l. 5.

But it may be aided by a release of damages on the demurrer, or a *non pros.* R. 1 Salk. 346.

Vide as to imperfect verdicts, 5 *Com. Dig.* 142, &c. a great variety of cases.

Rex v. John
Huggins, Esq.
M. 4 G. 2. B. R.
2 Stra. 882. Id.
Raym. 1574.

A special verdict in murder and judgment for the defendant, after debate upon the uncertainty of the verdict, and whether the prisoner should be discharged, or a venire facias de novo awarded.

The defendant stood indicted before the Justices of Oyer and Terminer at the Old Bailey, and the indictment set forth that *John Huggins*, 1 October, 12 Geo. 1. and long before, and until 1 January following, was warden of the Fleet, and had the care and custody of the prisoners committed thither. That *James Barnes* was his servant, employed by him in taking care of the prisoners. That *Barnes* being a person of a cruel nature and disposition, did, 1 November, 12 Geo. 1. make an assault upon *Edward Arne*, then a prisoner in the Fleet, and feloniously took him against his will, and carried him to a new-built room in the prison, where he kept him six weeks without fire, chamber-pot, or close-stool, the walls being damp and unwholesome, and the room built over the common-sewer. That at the time of such imprisonment *Barnes* and *Huggins* knew the room to be as before described. That *Arne*, by reason of his imprisonment in the said room, sickened, and by dures thereof died; and that *Huggins* was aiding and abetting *Barnes* in committing the said felony and murder.

The defendant *Huggins* only was taken, and having pleaded Not guilty, the Jury find this special verdict.

That Queen *Anne*, by letters patent under the great seal, dated 22 July, in the 12th year of her reign, constituted *Huggins* warden of the Fleet during his life, to be executed by himself, or his sufficient deputy or deputies. That from the date of the letters patent until

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1 January 12 Geo. 1. the defendant was warden, and *Thomas Gibbon* all the said time his deputy, and acted as such. That *James Barnes* was the servant of *Gibbon*, and acted in the care of the prisoners, and particularly of *Edward Arne*. That *Barnes*, 7 September 12 Geo. 1. assaulted *Arne*, and feloniously put him into a room (which is found to be as described in the indictment) and kept him there forty-four days without fire, chamber-pot, or close-stool, or such like utensil. That *Barnes* knew the room to be situate as in the indictment, and that it was unwholesome; and that for fifteen days at least before the death of *Arne*, *Huggins* knew the condition of the room, but whether he knew it before, *penitus ignorant*. That by duress of the imprisonment, *Arne* 10 September became sick, and languished till 20 October following, upon which day he died by duress of the said imprisonment in the said room. That fifteen days at least before his death, *Huggins* was once present at the said prison, and saw *Arne* under duress of the said imprisonment, and turned away, and at the same time he so turned away, *Barnes* shut the door, and *Arne* continued in the room till he died. That during the time that *Gibbon* was deputy, *Huggins* sometimes acted as warden. But whether he be guilty of the murder of *Edward Arne*, is the doubt of the Jury; on which they pray the advice of the Court; *et si pro Rege, pro Rege; et si pro defendente, pro defendente*.

This verdict was removed at the prayer of Mr. Attorney into B. R. and there argued by Mr. *Willes* and Serjeant *Eyre*; after which it was argued at *Serjeant's-Inn Hall*, in *Chancery Lane*, before all the Judges, by Serjeant *Chef-*

byre, Mr. Attorney, Mr. Solicitor, and Mr. Willes, for the king; and by Serjeant Darnall, Serjeant Eyre, Serjeant Hawkins, Mr. Peere Williams, Mr. Strange, and Mr. Forster, for the prisoner. But as every thing insisted on by either side is taken notice of in the opinion delivered by the Chief Justice, it will not be necessary to state the arguments of counsel.

Raymond, Chief Justice, after stating the heads of the special verdict, went on as follows. The general question in this case is, Whether, upon the facts as found in the verdict, the prisoner at the bar is guilty of the murder of *Edward Arne*.

For that purpose it will be necessary to consider these two things: 1. What offence it is in *James Barnes*; and, 2. Whether the prisoner is guilty in the same degree.

And as to the first point, we are all of opinion, that if *Barnes* was now before the Court, and the facts, as found in this verdict, were found against him; he would undoubtedly be guilty of murder. It is certain there is no particular way of killing another, that is necessary to constitute murder; but the committing of murder is as various as the several ways of putting an end to life. In the case of a prisoner there is no occasion for an actual stroke: the restraining him by force, and killing him by ill usage, is enough to constitute this offence. All the authors who speak of this species of murder, describe it by a general expression *per dure garde de ses gardens*. The duty of a gaoler is not to punish, but confine the party, for the single purpose of his being forth-coming to answer a legal charge or demand. *Fleta* 38. In this case *Barnes* has certainly exceeded

ed his duty : he has been guilty of a breach of that trust, which the law has reposed in him, and is answerable for all the consequences of it.

Another consideration to make it murder is, that it is a deliberate act, of long continuance, and of great cruelty. It is likewise accompanied with force, against the consent of the party. On all which accounts the law implies malice. Had he therefore been before the Court, there would have been no difficulty in adjudging it murder with regard to him.

2. Having thus determined what offence it would be in *Barnes*, let us now consider how it stands with regard to the prisoner at the bar. And though the indictment has charged him equally with the other, yet we think the verdict has made a wide difference between them. The indictment charges *Barnes* to be his servant, but the verdict finds he was the servant of *Gibbon*. The whole charge in the verdict against the prisoner is, that for fifteen days before *Arne's* death, he knew what sort of a room he was in : that he once saw him under the duress of imprisonment that *Barnes* had put him in : and that during the time *Gibbon* was deputy, *Huggins* sometimes acted as warden.

But notwithstanding these circumstances which are found against the prisoner at the bar, we are all of opinion he is not guilty of murder.

It is a point not to be disputed, but that in criminal cases the principal is not answerable for the act of the deputy, as he is in civil cases : they must each answer for their own acts, and stand or fall by their own behaviour. All the authors that treat of criminal proceedings, proceed on the foundation of this distinction ;

that to affect the superior by the act of the deputy, there must be the command of the superior, which is not found in this case.

The duress in this case consisted in the first taking him against his consent, and putting him in that room, and the keeping him there so long without necessaries, which was the occasion of his death. Now none of these circumstances are found as against the prisoner. The Jury does not say he directed his being put into the room, that he knew how long he had been there, that he was without the necessaries in the indictment, or was ever kept there after the time the prisoner saw him, which was fifteen days before his death. And as these are circumstances found against *Barnes*, and not against *Huggins*; and as in these cases the Court is never to intend any thing, but must found their judgment on the facts as stated in the special verdict, and on them only; there can be no colour to think one equally guilty with the other. The only circumstance relied upon to supply all this is, the prisoner's being once at the prison where he saw the deceased under the duress, and turned away. But surely the bare being present can never amount to an aiding and abetting. He saw him there, it is true; but does that infer he knew how it was occasioned, or consented to the continuance of it? It is very material in this case, that the duress by which this unfortunate man came to his end, could not be known by a bare looking in upon him: he could not know he was there against his consent, he could not by seeing him know the length of his confinement, or how long he had been without the decent necessaries of life: and it is likewise material, that no application is found to have

been

been made to the defendant, which perhaps might have altered the case.

These circumstances, taking them altogether, are a very slender evidence of a consent in the prisoner to the duress: though this I must say, that were they ever so strong an evidence of consent, they will not be sufficient for us to ground a judgment upon: we are to determine upon facts, and not on evidence of facts; so is *Kelyng* 78, 111, where it is found, that *Plummer* discharged the fuzee, but not that he discharged it *against* the king's officers; and the Court could not take it that he did. It would be the most dangerous thing in the world, if we should once give into the doctrine of inferring facts from evidence; which is the proper business of a jury, and not of the court.

But it is objected, that though the prisoner had made a deputy, he had still the inspection of the gaol; and for the time he was there, the power of the deputy ceased. To this I answer, that there is no case in law which proves, that the accidental presence of the principal amounts to a revocation; and in reason it ought to be construed such a coming, as shews he intended to take upon himself the execution of the office. If a disseisee comes to dine with the disseisor, that will not amount to an entry.

It is likewise insisted on, that in many cases a person who is absent when the murder is committed, may nevertheless be an aider and abetter; and the cases were put of laying poison, putting a child in a hog-stye, covering it with leaves, or leaving a sick man in the cold, by which he dies, which are all to be met with in *Kelyng*. Now as to these cases I

must observe, that in every one of them the person absent did the act which was the occasion of death; whereas here the act is found to have been done by another.

It was further observed upon this head of absence, that in *Staunf.* 17. *Cromp.* 24. *b.* the case is ruled to be murder, of letting a mischievous beast go abroad, which happens to kill a man. But surely that is laid down too general in those books: and it would be very hard, if a man takes a reasonable care to keep up the beast, that he should be answerable, if the beast should break out without his knowledge or consent.

There is but one thing more that was pressed by the king's counsel, *viz.* that since it was determined in *Oneby's* case, that it is not necessary for the Jury to find malice, why is it more necessary to find the prisoner's consent? To this I answer, that malice is matter of law arising from a legal construction of the act; and from the act of the party the law has always construed, whether there was malice express or implied: but consent is an act of the mind; a sudden killing is construed to be malicious, though there is no time for any consent. These are the reasons which induce us to determine, that upon this verdict the prisoner at the bar is Not guilty of the murder of *Edward Arne*.

But then upon the argument of this cause a difficulty arose, what the Court should do in this case, supposing the verdict to be too uncertain to found any judgment upon. It will therefore be necessary further to consider:

1. Whether this is an uncertain verdict; and,
2. Supposing it is, whether we are to discharge

charge the prisoner, or award a *venire facias de novo*.

Now as to the last point, it is observable, that no instance could be produced where, in a criminal case, it was ever done for a fault in the verdict itself. *Arundel's case* in 6 Co. was for a fault in the jury process, and in the case cited of *Hil. 8 H. 7. Ro. 3.* there was no verdict, the Judge discharged the Jury, and would not take their verdict, because it was put into their hands in writing as they stood at the bar.

And in the case of *Mr. Keate*, 5 Mod. 287. *Skinner*, 666. though the verdict was so uncertain, that it was impracticable to determine either way, for want of finding who struck first; yet *Holt, C. J.* was so averse to a *venire facias de novo*, that he himself took an exception, that quashed the indictment, in order to put it into a proper way of being tried over again.

But whatever may be the determination of the Court, when that point comes properly before us, it is unnecessary for us now to consider; because as to the other point we are all of opinion, that this verdict is not uncertain.

There is no uncertainty as to the facts that are found: the only fault is, that there are not such facts found as will amount to murder. The consequence of which is, that the defendant is not guilty of murder; and it would be endless to send it back to a jury, till they find facts enough to make it murder; besides its being contrary to law, in exposing a man to a second hazard of his life.

It would have been a circumstance very material in the case of *Plummer, Kelyng III.* to

have found, that the fuzee was discharged at the king's officers; but the Jury were silent as to that, and the Court said they could not take the fact to be so, upon bare evidence of the fact; and proceeded to give judgment, as if the fuzee had not been discharged against the king's officers, without sending it back to the Jury to find it positively one way or the other.

So in the case of *Messenger et al'* (*Kelyng*, 79.) who were indicted for high treason in assembling and pulling down bawdy-houses. The verdict was silent as to *Green* and *Bedell*, whether they were aiding and assisting; and this (says *Kelyng*) being a matter of fact, which ought to be expressly found by the Jury, and not be left to the Court upon any colourable implication from their being present; they two were discharged, without sending it back to the Jury for their further opinion as to the fact.

In *Kelyng*, 66. on a special verdict, it was found that *Thompson* and his wife were fighting, and *Dawes*, endeavouring to part them, was killed by *Thompson*; and it not being found that *Thompson* knew *Dawes* intended only to part them, it was held man-slaughter, without sending it back to the Jury to be certified of his knowledge.

These are cases directly in point as to this head; and I must observe, that *Plummer's* case was after the case of *Keate*, wherein *Holt*, Chief Justice, had had this point under his consideration.

This verdict therefore being sufficient to found a judgment upon, our judgment is, that the prisoner is Not Guilty, and therefore he must be discharged.

This

This was an action on the case for several sets of scandalous words spoken of plaintiff by defendant. Plaintiff on the trial obtained a verdict, and the damages were found entire, though some of the words were not actionable. *Belfield* moved for a *venire facias de novo* on payment of costs, that plaintiff might sever his damages according to an ancient rule of court; which was granted by the Court.—*Eyre* for plaintiff.

I have given this case because reported by Mr. *Barnes*; but I doubt the law, and do not know to what rule the author alludes.

To a *mandamus* to restore the plaintiff to the office of alderman, it was returned, that at an assembly held such a day the plaintiff was, for being absent three years, removed. And upon a traverse of every part of the return, a special verdict was found as to some points which are not necessary to be stated, inasmuch as no opinion was given upon any but one, which was this, The removal was not upon a charter-day, so a summons of an assembly was necessary. The mayor gave orders for a summons of all the members, but the serjeant being informed, and believing that one of the aldermen was out of summons, neglected to give him notice, though he had a house and family in the town, and accordingly returned him out of summons. And upon this part of the case the Court was of opinion, it was not a regular assembly, for every member should be summoned; and he has a right to debate as well as vote. And this point has been so often settled, that it is not now to be made a question. And by the same reason that the omitting to summons one man may be

Anger v. Wilkins, M. 6 G. 2. *Barnes*, 478.

General verdict for plaintiff in action for words: some not actionable, *venire de novo* that damages might be severed.

Kynaston v. the Mayor, Aldermen, and Assistants of Shrewsbury, T. 9 Geo. 2. 2 Stra. 1051.

If one member be omitted to be summoned to a corporate assembly, the act is void.

be excused, the omission of a greater number may be passed over.

Whereupon a rule was pronounced for a peremptory *mandamus*; and the plaintiff prepared to enter up a judgment for his damages and costs, when it was found, that at the trial there was an omission of damages, and consequently there could be no judgment for costs.

Where on trying a traverse in a return, no damages are given, this cannot be supplied by writ of inquiry.

2 Stra. 1021.

To supply this defect, the Court was moved for a writ of inquiry; and *Cro. Car.* 143. and the cases of *quare impedit* and dower were cited, where damages not being the gift of the action, the want of them may be supplied by writ of inquiry.

To this it was answered and resolved by the Court, that the rule laid down in *Cheney's* case, 10 *Co.* is right, that where the Jury are charged with a matter for which an attain will lie if they give a false verdict, it can never be supplied by writ of inquiry, but must be by *venire facias de novo*, and so is *Salk.* 205. 5 *Mod.* 113.

By the statute 9 *Ann. c.* 20. this traverse is given in the room of an action for a false return: and as there it cannot be said the damages are collateral, so neither can it here; for they are consequent upon the issue, and as much within the charge of the Jury. No one can doubt, but that if in an action for a false return, damages had not been given, they could not be supplied by a writ of inquiry. All the cases of replevins upon the statute 17 *Car.* 2. *c.* 7. are in point as to that. 1 *Sid.* 38c. *Raym.* 170. 1 *Ven.* 40. 2 *Keb.* 408. *Tucker v. Stevens in C.B. Trin.* 6 *Geo.* 1. Here it ought to be by the same jury, and there is no difference between a special and a general verdict. The plaintiff's counsel will therefore consider what to do, or pray.

And

And a writ of error being then depending in parliament, it was not thought adviseable to pray a *venire facias de novo*, but to consider of some form of a judgment to be entered up, in order to carry to the Lords. And the judgment that was entered was, " It is considered " by the Court, that the return is not sufficient in law to bar or preclude the said " *Corbet Kynaston* from being restored to the " said place or office of one of the aldermen " of the said town, and that the said return " for the reasons aforesaid be disallowed and " quashed."

And thereupon the cause was argued at the bar of the House of Lords, where no opinion was given upon the points of the special verdict, but a judgment pronounced for remitting the record to *B. R.* who were directed to award a *venire facias de novo*. There were three Judges present, *C. J. Willes*, *J. Denton*, and *B. Thompson*, to whom two questions were put.

1. Whether there being no damages, any judgment could be entered? To which they answered, that there could not; and declared that no waiver or *remittit.* of damages below could have set this right, for then there would be nothing to give judgment for, the entry being only a judgment for damages and costs, and the peremptory *mandamus* goes by rule for him, for whom judgment is given, which are the words of the statute.

The second question put to the Judges was, Whether, as no damages are given, the plaintiffs in error would not be subject to an action, which would be a double vexation? As to this their opinion was, that an action might be brought, the statute only taking it away in

in case damages are given upon trying the traverse.

The judgment was reversed, and a *venire facias de novo* directed to be awarded by B. R.

Street v. Hop-
kinson, et al'
Mic. 10 G. 2.
2 Stra. 1055.

Upon pleading
the statute of
limitations in
error, the judg-
ment is to bar
the plaintiff of
his writ.

1 Stra. 127, 439,
683.

A writ of error was brought, *tam in red-
ditiōe judicii* against the testator, *quam in ad-
judicatione executionis* against the executors: as
to the principal judgment, the defendant in
error pleaded the statute of limitations, and
prayed that the judgment be affirmed. As to
the award of execution, *in nullo est erratum* was
pleaded. And that appeared to be in a *scire
facias* against two executors, one of whom
pleaded *ne unques executor*, and the other plead-
ed payment by the testator: and upon this
plea there was a verdict against it, but no ver-
dict as to the other, and then follows the award
of execution.

As to the principal judgment, the only
doubt was, whether, as the defendant in error
had concluded with a prayer that the judg-
ment be affirmed, the Court could give the
proper judgment, which was, that the plain-
tiffs be barred of their writ of error.

But the Court held, that they were not
bound by the prayer of an improper judg-
ment, and therefore pronounced the rule, that
the plaintiff in error should be barred.

And as to the award of execution, they were
of opinion it was wrong, and that not being
in the same court, they could not award a *ve-
nire facias de novo*; and this being a distinct
judgment, might be reversed without affecting
the other. And it was reversed accordingly.
The cases cited upon the first point were
Show. 50. Carth. 369, 370. Lutw. 1386.
3 Lev. 58. And on the second point, *1 Roll.*
Abr. 803. 1 Inst. 127. 3 Salk. 372. Cattle v.
Andrews,

Vide ante.
There cannot
be a *venire facias
de novo* award-
ed on error.
Vide post.
Grant v. Affle,
and *Parker v.*
Wells, contra.

Andrews, Hil. 5 W. & M. rot 826. in B. R. Cumb. 259. Salk. 4. 363.

This was an action of trespass, to which defendant, by leave of the Court, had pleaded three pleas, *viz. Not guilty*, and two several *justifications*. On the trial, defendant proved his second plea, to the satisfaction of the Court, and obtained a verdict on the first and second issues; but as to the third issue, no proof was gone into, nor any verdict found relating to it. *Belfield*, for plaintiff, objected, that the verdict was incomplete, imperfect, and uncertain, nothing being found as to a material fact put in issue; and therefore, as to the third issue, *a venire facias de novo* ought to be awarded. On shewing cause, *Prime*, for defendant, observed, that by the first plea, (not guilty) the whole is put in issue; that, by the second plea, the whole trespass is covered, and therefore the verdict is complete. It is found thereby, that plaintiff has no cause of action, and the Judge who tried the cause did not think it needful to go farther. As plaintiff has no cause of action, he can have no damages. Contingent damages in case of issue and demurrer, and issue tried before argument, are not necessary to be found at the trial on plaintiff's verdict, but may be afterwards supplied, if judgment for plaintiff on the demurrer.

Per Cur'. Here is enough found for the Court to give judgment upon. No *venire facias de novo* ought to issue. It was not the business of defendant, but of plaintiff, to have the third issue determined, if he imagined that thereby he might be intitled to costs, or any other advantage.—The rule discharged.

N. B.

Bartlett v. Spooner, E. 24 Geo. 2. Barnes 461.

Not guilty in trespass and two justifications. Verdict for defendant on the two first issues, not any proof or verdict as to the third issue. Motion for venire de novo as to the third issue, but refused.

N. B. Plaintiff gave no evidence on the Not Guilty.

Crowder v.
Rocke, T. 2
G. 3. 2 Will.
144.

If it appears on the face of the *jurata*, that the cause was tried after the day of *nisi prius* mentioned therein; there must be a *venire facias de novo* awarded, for the *hab. corpora* and *jurata* cannot in this case be amended.

Eichorne v.
Lemartre, H.
8 G. 3. 2 Will.
367.

Wherever attaint would lie, writ of inquiry cannot be awarded to assess damages, but *venire de novo* must go; so, if issue is joined in abatement, and verdict for plaintiff.

Drage v. Bra-
vet, P. 8 G. 3.
2 Will. 377.

In debt for a penalty of £. 500 on articles not to cut trees, &c. on penalty, &c. if there is verdict for plaintiff, that defendant owes the debt and one shilling damages, a *venire facias de novo* shall go, for the Jury should have assessed the real damages on the breaches assigned, and plaintiff cannot take a verdict for the whole debt by 8 and 9 W. 3. c. 10.

Grant v. Afle,
T. 21 G. 3.
Doug. 696. B. R.

One fine cannot be assessed on the admission to several copyhold tenements. If any count in the declaration state one fine, although the others state several, and there are entire damages, and judgment for the plaintiff, it is error. A court of error may award a *venire de novo*.

This was a writ of error from the Court of *Common Pleas*, on an action of *assumpsit*, by *Afle*, as lord of the manor of Great *Tay*, in the county of *Essex*, against *Grant*, for the fines assessed by the lord, on *Grant's* admission to eight different customary tenements. The declaration consisted of three counts. The first stated, that *Afle* was lord of the manor; that the eight tenements (enumerating and describing them particularly with their names, and the names of the different parts of which each consisted, where there were different parts of the same tenement with distinct names, and the number of acres which each tenement, or its different parts, by estimation, contained)

were, and for time immemorial had been, parcel of the said manor, and customary tenements of the said manor, *demised and demiseable* by copy of court roll of the said manor, by the lord of the said manor, or by his steward, or deputy steward of the courts of the same manor for the time being, to any person or persons intituled to take the same in fee-simple, or otherwise, at the will of the lord, according to the custom of the said manor; and that within the manor there was a custom, that every customary tenant, upon his admission to any customary tenement, parcel of the manor, by the lord or his steward, or deputy steward, should pay to the lord a *reasonable sum*, to be *assessed by him*, or his steward, or deputy steward, for a fine, for such his admission to such customary tenement. It then stated eight several admissions of *Grant*, by the deputy steward, to each of the eight customary tenements respectively; that the *first* was of a large annual value, *viz.* of the annual value of £. 23. 8s. 9d. and that *Astle*, at the time of admission of *Grant* to this first tenement, did assess or appoint the sum of £. 46. 17s. 6d. as and for a fine for his admission to that tenement, to be paid by *Grant to Astle*, at the messuage called the *Guildball*, in *Great Tay* *aforesaid*, being the place where the courts for the manor were usually holden, at twelve o'clock, *A. M.* on *Thursday* the 20th of *August* then next ensuing; that the said £. 46. 17s. 6d. was a *reasonable sum* of money to have been paid to *Astle* by *Grant*, for his admission to that tenement; and then an *assumpsit* by *Grant* for the £. 46. 17s. 6d. Then similar separate allegations with regard to the several fines of

£. 4.

(1)
Some of the
counsel spoke of
what is here
called the first
count, and was
so described in
the assignment
of errors, as
consisting of
eight counts,
there being
eight separate
assumpsits al-
leged.

£.4. 10s.; £.2. 12s. 6d.; £.11. 18s.; £.3.;
£.1. 10s.; £.7. 10s.; and £.24. respectively,
for the seven other customary tenements (1).
The second count stated, that, "whereas
Grant afterwards, *to wit*, &c. was indebted to
Astle in the further sum of £.98. 18s. 4d. for
a certain other fine due and of right payable
from the said *Grant* to the said *Astle*, as lord
of the manor of Great *Tey*, for the said *Astle*'s
admission of the said *Grant*, at his special in-
stance and request *to certain other customary te-
nements*, parcel of the said manor, to be held
by the said *Grant* and his heirs, of the lord of
the said manor, at the will of the lord, accord-
ing to the custom of the said manor, by *certain
rents, services, and customs* therefore formerly
due, and of right accustomed; and then an
assumpsit for the said last-mentioned sum. The
third count was for £.100. money paid, laid
out and expended. *Grant* pleaded the ge-
neral issue, paying; at the same time £.84.
5s. 8d. into Court; and the cause came on to
be tried before ASHHURST, *Justice*, at the as-
sises for the county of *Essex*, when a general
verdict was found for *Astle*, with £.98. 18s. 4d.
damages, subject to the opinion of the Court
of *Common Pleas*, on a case reserved. That
court having decided in favor of *Astle*, he re-
mitted the £.84. 5s. 8d. upon the record,
and took judgment for the difference. *Grant*
then brought this writ of error, and (besides
several on the first count, which, not having
been insisted on, I omit) assigned the follow-
ing errors on the second count: 1. That no
title was alleged, nor did appear to be vested
in *Astle*, to entitle him to a fine upon the ad-
mission of *Grant*; whereas, by the law of the
land,

land, a title ought to have been stated, whereby he claimed the said fine. 2. That no custom or prescription was therein stated or alledged, whereby such a fine as was thereby claimed could arise, or become payable. 3. That it appeared, "*that one gross sum had been assessed, and was claimed as a fine for divers distinct and separate customary tenements*; whereas, by the law of the land, separate and distinct fines ought to be set and assessed upon each several and respective tenement."

Wood for the plaintiff in error,—*Law* for the defendant.

Wood insisted, that the second count was bad, and that, if so, as the verdict was general, the judgment must be reversed: 1. In order to support this count, he said, a great many circumstances, essential to intitle the plaintiff to maintain his action, must be presumed, and supplied by intendment. 1. There is no allegation of any custom to take fines, and, without such a special custom, no fine is payable. 2. It is not alledged that the fine was reasonable. 3. It is not stated how it was assessed. 4. Nor how appointed to be paid. 5. Nor that the defendant had notice before the action brought. 6. It is not sufficiently shewn, that the tenements are copyhold, for, they are not alledged to have been *demised and demisable* from time immemorial, &c. They are indeed called customary, but *that* they may be, and yet not copyhold, nor subject to the payment of fines upon admission. It is not denied, that *indebitatus assumpsit* will lie for a copyhold fine (2), but all the circumstances just mentioned are necessary to raise the *assumpsit*, and there is no case in which the court has presumed so many things even after

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U

verdict.

(2)

It was solemnly decided, that *assumpsit* will lie, in the case of *Shuttleworth*

v. Garnet, cited
Cowp. p. 702.
by the opinion
of Dolben, Gre-
gory, and Eyres,
Justices, against
that of Holt,
Chief Justice.

(a)
B. R. E. 21
Car. 2. 1 Ventr.
27.

(b)
B. R. M. 14
Jac. 1. 3 Bulstr.
230.

verdict.—Upon this head of objection he cited *Moore v. Lewis* (a), which was an action of *assumpsit*, and the declaration contained two counts; in the first, the consideration of the *assumpsit* was, that the plaintiff had done the defendant *multum et gratissimum beneficium*; in the second, that he had done him *multa beneficia*. There was a general verdict; and motion in arrest of judgment, because neither of the considerations were sufficient, especially not the last, for that some particular service ought to have been alledged; and the Court held clearly, that nothing being particularly expressed in the consideration of the second promise, and entire damages being given, the plaintiff could not have judgment. He also cited *Elkin v. Wastell* (b), where, upon a writ of error, the Court agreed that land could not be intended to be copyhold, but must be so alledged. But, 2. He contended that there was another objection which was decisive, viz. that assigned as the third error on the second count. He said, he took it to be quite settled, that there cannot be one gross fine for several distinct tenements; and it was impossible to read this count, and not to see that the fine was for divers tenements. The words are, “a certain other fine,” and “certain other customary tenements;” not, “a certain other customary tenement.” This must mean more than one tenement. It goes on farther, and states them to be held by “certain rents, services, and customs;” and, if there is a plurality of rents and services, there must also be a plurality of holdings. In the first count, the words customary tenements, are manifestly used to express several distinct tenements, and there cannot be a better way of explaining the meaning

of

of one part of the declaration, than by comparing it with the other part. On this head he relied on *Hobart v. Hammond* (c), where it was expressly resolved, that, when a copyholder has several lands held by several services, by copy, there the lord ought to assess and demand the fines severally for every parcel which is so severally held; *Taverner v. Cromwell* (d), and *Hitch v. Wallis*, before BLACKSTONE, *Justice*, at the Lent assizes for the county of Cambridge, 17 Geo. 3.

(c)
B. R. M. 42 et
43 Eliz. 4 Co.
27 b. S. C. Moore
622. and Cro.
Eliz. 779. by the
name of Dalton
v. Hammond.

(d)
B. R. T. 26
Eliz. 4 Co. 27. a.

LORD MANSFIELD desired *Law* to confine himself to *Wood's* second objection.

Upon that point, *Law* said, it ought to be considered, that, here, the objection was made after verdict, not on a demurrer, or at the trial, as in the case of *Hitch v. Wallis*, in which case the plaintiff would have given evidence of one gross consolidated fine for divers tenements. The Court, in this case, will give to the word "*tenements*," such a sense, if possible, as will support, rather than overturn the count. "*Tenements*," as defined in *Coke Littleton* (a), means any "*corporate inheritances*," or any "*inheritances issuing out of those*." It may stand for *messuages and lands*, and, if you translate the sign into the thing, the declaration will run "*certain other customary messuages and lands*," which would certainly be sufficient, as the fine may be supposed to have been assessed for one copyhold estate composed of different parts, as houses, arable grounds, &c. As to the words, "*rents, services, &c.*" in the plural, one copyhold estate may be held by several different sorts of rents and services, to be paid and performed at different times. In *Shuttleworth v. Gar-*

(a)
Co. Litt. 19 b.

(b)
B. R. M. 1 W.
et M. Carth. 90.
3 Mod. 239.
3 Lev. 261.
1 Show. 35.
Comb. 151.

(c)
Carth. 91.

(3)
The present question does not appear to have been made in that case; the only point argued being, whether *assumpsit* was a proper form of action. Vide Cowp. p. 700. note (3).

(d)
C. B. T. 32 &
33 G. 2. 2 Will.
95.

net, as reported in several different books (b), the declaration was on a general *indebitatus assumpsit* for a *fine*, payable on the death of every lord, and assessed on the defendant, as tenant *quorundam custumariorum tenementorum* (c), and upon a motion in arrest of judgment, it was determined that the action lay (3). So in the case of *The Mayor of Exeter v. Trimlet*, (d) where on a general demurrer to an action of *assumpsit* for petty customs, in which the declaration contained two counts, the first setting out a prescriptive right, and the second being a general *indebitatus assumpsit* for a certain sum due for petty customs,—the demurrer was over-ruled, and WILLES, *Chief Justice*, in delivering the judgment of the Court, said, they gave no *positive* opinion as to the *second* count, but inclined to think it was well enough upon a general demurrer, and that, if the defendant had pleaded *non assumpsit*, the plaintiff at the trial would have been obliged to shew his right to the petty customs. Surely the plaintiff here, is intitled to, at least, as much advantage after verdict, whatever might have been the case upon a special demurrer. There, it is said, the plaintiff must have *proved* his right. Here, the Court will presume, that the right was proved; and no judge at *nisi prius* would have suffered evidence to be produced of one general consolidated fine for several copyholds: it must be intended that the proof was either of one estate, or of several assessments. If the Court should think “tenements” in the plural, cannot be interpreted to mean one estate composed of different parts, they will reject the letter *s*, rather than turn the plaintiff

tiff round. The word "parcel" may assist to shew that only one copyhold was meant.

Lord MANSFIELD.—I have exceedingly lamented, that ever so inconvenient and ill-founded a rule should have been established, as that, where there are several counts, entire damages, and one count is bad, and the others not, this shall be fatal; upon the fictitious reasoning, that the Jury has assessed damages on all, although they in truth never thought of the different counts, but the verdict was so taken, from the inadvertence of counsel in the hurry of *nisi prius*. And, what makes this rule appear more absurd, is, that it does not hold in the case of criminal prosecutions; for, when there is a general verdict of *Guilty* on an indictment consisting of several counts, if any one of them is good, that is held to be sufficient. But in civil cases the rule is now settled, and we have gone as far as we can, by allowing verdicts in such cases to be amended by the judges notes (a). That might have been done in this instance in an earlier stage of the proceeding, but cannot now after judgment.

(a)
Eddowes v.
Hopkins,
ante ix. (10.)

BULLER, *Justice*.—The Court may grant a *venire de novo*. A good cause of action is shewn in the first count; and that it is true, appears by the verdict; but the plaintiff has also laid damages assessed to him on a count in which he has not shewn any cause of action. The Court, under these circumstances, may send the case back to have damages assessed only on that count, on which, in point of law, he is intitled to recover.

The Court then said, there was no doubt but

but a *venire de novo* might be granted by a court of error: that it had been done by the House of Lords, and was not a new practice, for upon an enquiry made by this Court on a late case from *Ireland*, a great many instances had been found.

A *venire de novo* awarded (4).

Upon

(4) The cause came on to be tried, on the *venire de novo*, before *Ashburst*, Justice, at the *Lent* assizes for the county of *Essex*, 22 *Geo.* 3. when the Jury, upon the evidence, thought that the sum of £. 46. 17 s. 6d. stated to have been assessed as a fine on the admission to the first of the eight tenements, exceeded two years value, and that the fine ought only to have been £. 46. 4 s. 3d. *Ashburst*, Justice, was of opinion, that the plaintiff could not have a verdict for that smaller sum, but must recover either to the exact amount of the fine declared upon, or not at all. The plaintiff's counsel, however, insisting strongly that he might recover whatever the Jury should find the two years value to be, a verdict was found for the plaintiff, by consent, on the first count for two years value, with liberty to enter the verdict for the defendant, if the Court should think the plaintiff was bound to prove the exact sum laid.

In *Easter Term* 22 *G.* 3. this question was argued by *Rous*, *Erskine*, *B. Hunter*, and *Law*, for the plaintiff (*Aple*); and *Peckham* and *Mingay* for the defendant; and in the same term, on *Saturday* the 11th of *May*, Lord *MANSFIELD* delivered the opinion of the Court in favour of the defendant, as follows:

Lord *Mansfield*.—The only count in the declaration which is now material, is for several fines for admission to several copyholds; the declaration states a custom for every customary tenant to pay a reasonable fine upon his admission, to be assessed by the lord, &c. that this tenement was of a large annual value, viz. of the annual value of £. 23. 8 s. 9d. that the lord had assessed £. 46. 17 s. 6d. as a fine for the defendant's admission to this tenement, and that this sum was a reasonable fine. On the evidence it appeared, that the fine should have been only £. 46. 4 s. 3d. that being the full amount of two years value, and the question now is, Whether the plain-

tiff

Upon a writ of error from the judgment (a) of the Court of *King's Bench*, the following questions were put to the Judges by order of the House of Lords.

Parker v. Wells
in error, E. 27 G.
3. B. R. Durn. &
East, 783.
15th May 1787.
Dom. Proc.

First, (a)
Durnford &
East, 40.

tiff can, in this case, recover a smaller sum than the fine assessed? Two things are necessary parts of this custom : 1. The fine must be *assessed*; 2. It must be *reasonable*. The lord says in his declaration, that he has *assessed* £. 46. 17 s. 6 d. for a fine, and that this sum was *reasonable*, and brings his action for that precise sum. The question for the Jury was, Whether £. 46. 17 s. 6 d. was a reasonable fine? and they found it was not, therefore the plaintiff is not intitled to recover. He has not assessed two years value, but a precise gross sum; and by what rule he went in assessing that sum, does not appear upon the record. It is true, he has averred that the estate is of a large yearly value, *viz.* of the yearly value of £. 23. 8 s. 9 d. but that is no averment of what the yearly value really is. And the averment in this case is totally immaterial. It would have been enough if the plaintiff had stated, that he had assessed the sum of £. 46. 17 s. 6 d. as a fine, and that such sum was reasonable; and it would *then* have been matter of evidence, just as it was on *this record*; whether the sum assessed exceeded two years value or not, because that is the established criterion whether it be reasonable or not. In the present case the duty is numerically certain, for it is not assessed with relation and in proportion to the annual value, but is fixed at a gross sum. The only case on this subject is *Titus v. Perkins* (a), which is reported in *Skinner* (b), *Carthiew* (c), *Levinz* (d), and 3 *Mod.* (e). The *Chief Justice* there says, " If the lord demand more than he ought, he may make his demand *de novo*, for the Judge, in case of a greater demand than is due, ought not to adjudge as much as is due to the lord, and bar him for the residue, but ought to adjudge against him for the whole, and that his entry was tortious, *if he had entered*, and put him to a new demand (f)." This goes to the demand itself, and is not confined to the case of a forfeiture; and there is no such distinction made in that case (which had been insisted on at the bar.) The *gist* and foundation of every action must be proved as laid

(a)
C. B. H. 1 et
2 Jac. 2.
(b)
Sinn. 247.
(c)
Carth. 12.
(d)
3 Lev. 249. 255.
(e)
3 Mod. 133.
Reported also
in Comberb. 43.
(f)
Sinn. 249.

A *venire facias* de novo awarded by the House of Lords, upon a writ of error upon a special verdict, the finding being insufficient.

First, Whether the finding on this verdict be sufficient whereupon to give final judgment?

Secondly, If the finding be insufficient, what award ought to be made on such finding?

Thirdly, If the finding be sufficient, whether upon such finding the plaintiff in error appear to be a trader, within the true intent and meaning of the statutes concerning bankrupts?

The Lord Chief Baron *Eyre* delivered the unanimous opinion of the Judges present upon the *first* question in the negative; and upon the second question, that a writ of *venire facias*

(g)
Walker v.
Witter, Doug.
M. 19 G. 3. p. 1.
(h)
Vide Doe &
Jackson, Doug.
E. 19 G. 3. p. 167.
(i)
2 & 3 Ed. 6. c. 13.
(k)
Gardiner v.
Croasdale,
B. R. H. 33 G. 2.
2 Burr. 904.
1 Blackst. 198.

in the declaration. This action is for a certain precise sum, and, under the circumstances of the case, it could not be brought in any other way. The cases cited for the plaintiff, *viz.* of debt on a foreign judgment (g); or against a tenant for *double the value of the land*, when he holds over under the statute of 4 Geo. 2. cap. 28 (h); or for *treble the value* for not setting out tithes, under the statute of Ed. 6. (i); or of *assumpsit* for a total loss on a policy of insurance, when there has been only a partial loss (k), are not at all applicable to the present case; for, in all of those the *gist* of the action is supported, and a case proved consistent with the declaration, those actions being not for a precise sum, but for a sum in proportion to what the Jury shall find to be the value or the damage. We give no opinion whether the lord might not have assessed a fine for two years value, and made that solely the foundation of his declaration. In *Titus v. Perkins*, a custom to have a year's value, generally, for a fine, was held to be good. But, however that might be, it is very clear that the evidence here did not support the declaration, for the plaintiff has no right to any thing but the sum assessed; the duty arises upon the assessment, and *that* by the evidence is proved to have been illegal and void. Therefore the case stands as if no assessment had ever been made, and consequently the plaintiff's right

cias de novo ought to be awarded; whereupon it was adjudged accordingly that the Court of King's Bench do award a *venire facias de novo*.

right to demand a fine is not yet complete. Therefore we are all of opinion with the defendant.

There was accordingly judgment for the defendant; because, as the fine for the first tenement was to be deducted from the damages, he had paid more into Court than the plaintiff was intitled to recover.

IX. Of other Matters respecting new Trials, &c.

(20.) Of New Trials in Inferior Courts.

Cole v. Greene,
H. 22 & 23
Car. 2. B. R.
1 Lev. 309.
Converting a
brewhouse into
tenements of
greater value is
wast.

WAST in the *Hustings, London*, upon a lease for years of a brewhouse in *London*: the defendant pleaded *null wast*, and issue upon this; and upon the evidence it appeared, that the defendant *took down the brewhouse* and erected several houses in the place, and improved the rent from £. 120 to £. 200 *per annum*, and by the direction of *Howell*, Deputy Recorder, before whom the cause was tried; (inasmuch as by this, the nature of the thing and the evidence was altered;) the Jury found this to be wast, and gave single damages £. 200, which was trebled at £. 600; but then judgment was arrested upon motion before Sir *William Wild*, the Recorder himself, for the insufficiency of the verdict; because the writ and count are *que fecit vastum venditionem & destructionem*: and the Jury found *fecit vastum venditionem & destructionem scil. divellendo the brewhouse*, and taking the coppers, and the other particulars, &c. but they did not find any sale of any of the particulars upon the place. *Long quinto E. 4. 100. in wast* for felling and selling of trees, the defendant pleaded that he felled and employed them in repairs,

repairs, and the plea was ill, because he did not traverse the *selling* notwithstanding that to this it was answered, that although in a plea the *selling* is material, because if he sell them it is waste, although he repurchases them and employs them in repairs, and because the *selling* is traversable, so that it may appear to the Court, if the employing them in repairs be waste or not : but in a verdict when the waste is found this is sufficient whether they are sold or not. But the verdict was for this exception ruled to be insufficient, and a rule for a new trial granted, upon which the Jury, in respect to the improvement, by the directions of Sir *William Wild*, before whom the new trial was had, gave a verdict for the defendant, and judgment was thereupon given for the defendant.

Upon this judgment *Cole* brought a writ of error before *Vaughan*, C. J. of C. B. *Hale*, C. B. *Turner*, B. and *Rainsford* and *Morton* Justices, assigned at *St. Martin's-le-Grand*, and upon hearing of counsel before *Howell*, Deputy Recorder, the judgment, and both verdicts, and the rule for the new trial (which was) *quia videtur Cur' quod verdict' prædict. est vitiosum & erroneum, ideo cassetur, & habeatur nova trialio*, were all certified, and before the said Justices so assigned, four points were argued and adjudged. *First*, That the first verdict was sufficient, for the reason before alledged, *Rast. Entr. 695. b. 696. d. 689. Pasch. 7. Eliz. 3. Pl. 1.* *Secondly*, That both the verdicts and the rule were well certified at first upon the writ of error, because the Hustings being an inferior court, no diminution may be alledged of certifying more than is certified at first, and if the first verdict be not certified and the rule,

Verdict set aside, and new trial and contrary verdict, and judgment, and upon this error brought, and all certified without diminution.

the

the erroneousfnefs of the proceedings in the Huftings cannot appear, and fo no remedy upon the writ of error; and for this were cited *Co. 8. 65. Loveday's cafe, Co Entr. 252. Donnal's cafe.* Thirdly, That the Court here ought to reverse the judgment, becaufe the court below erred in fetting afide the firft verdict as infufficient when it was fufficient. Fourthly, That the Court here ought to give the fame judgment here for the plaintiff, upon the firft verdict, as the court below ought to have given. And this by virtue of the words in the writ of error, *Et ulterius fa&uri quod ad juftitiam pertinet fecundum leges regni & confuetudinem civitatis prædictæ*, and although no precedent was produced of fuch a thing done before in this cafe, yet they faid they would prefume the customs of *London* to be according to the common law, if no precedent was fhewn to the contrary. And upon this all the Judges agreed and reversed the judgment, and gave judgment for the plaintiff upon the firft verdict.

The Judges at St. Martin's give the fame judgment as the Judges in the Huftings ought to have given.

Upon which judgment of reversal the defendant brought a writ of error in the Houfe of Lords, and affigned for error that the Jury did not come *from the four next wards*, which according to the custom of *London* they ought to have done; upon which the defendant in error pleaded *in nullo est erratum*; and upon argument there, the Lords, with the advice of the Judges, resolved thefe points. Firft, that this was not affignable for error, being contrary to the record; becaufe the award of the *venire facias est de quatuor proximis wardis*, and the writ returned ferved accordingly, and it is not like to the cafe 3 *Cro. 320.* nor 1 *Roll. Ab. 761.* which are of more infe-

Error contrary to the record is not affignable.

rior

rior courts, where it was assigned that one named *Alderman* was not an alderman. And one named *Steward* of *St. Catherine's*, was not *Steward*. But the courts and customs of the city of *London* are confirmed by act of parliament, and are as the *grand sessions* of *Wales*, or the *palace-court*, and *Roll's* 1. *Abr.* 758. nu. 3. It may not be assigned that the deputy of the *grand sessions* before whom the cause was tried, was not deputy, and *Molins* and *Nesby's* case, *Trin.* 14 *Car.* 2. *B. R. Rot.* 1098. and *King* and *Allen's* case in the same court, it may not be assigned that the Judge of the *Marshalsea* was not judge, or was not present in court. Secondly, that *in nullo est errat* is a demurrer, and although that this is error in fact, it is not confessed by the demurrer, not being assignable. But the demurrer is upon this in point of law, because not assignable, wherefore the judgment was affirmed and remanded to *St. Martin's* to be executed. And there it was objected that they could not execute it, because they had not any seal for sealing the execution. But to this a precedent was produced dated 11 *June*, 22 *Eliz.* between *Crowther* and *Gee*, where in a similar case, the justices seal the writ of execution with their particular hands and seals, and so the court resolved to have it done here, but before that this was done *Greene* the plaintiff in error died, not having any goods in *London*. And *Forth*, alderman of *London*, claiming by lease under *Greene*, had preferred a bill in Chancery, to be relieved by his bill. This wast being an improvement, but he for having an injunction, was ordered by the court to enter into a recognizance to answer for *Greene*, being an ancient man, and upon hearing the cause there in

In nullo, &c.
is a demurrer,
but does not
confess error in
fact not well
assigned.

How the Jus-
tices in error at
St. Martin's
grant execu-
tion.

Chancery after
verdict and
judgment, and
this affirmed in
error, directs a
new trial in
wast.

in respect that there had been one verdict for the plaintiff and another for the defendant, *Bridgman*, Lord Keeper, after all these proceedings, directed a new trial at the bar of the *King's-Bench* to try in a feigned action, *wast or not*, and upon this trial before *Hale*, then Chief Justice, it was resolved to be *wast* notwithstanding the improvement, by reason of the alteration of the nature of the thing, and of the evidence, and the Jury gave their verdict accordingly, and 100 marks single damages, which trebled amounted to £. 200. which the Chancellor compelled *Cole* to take.

The record certified immediately from St. Martin's into B. R. without *mittimus* out of Chancery.

Cole, for having execution of the place *wasted*, had the record transmitted by *certiorari* immediately from the justices at *St. Martin's* into B. R. without having this certified in Chancery, and from thence by *mittimus* sent into B. R. and from thence a *scire-facias* issued against the administrator of *Greene*, and against *Forth* and others, surmising that they were interested in the place *wasted*, and now held it; they came in and demurred to the writ, because the plaintiff ought not to have seisin, because *non constat* that *Forth* entered upon title under *Greene*. 2. Because the record is not legally removed into this Court to be executed, wherefore judgment was prayed of the writ, and that the same might be quashed.

And now four questions were resolved by the whole Court; *First*, That the record was legally removed immediately into this Court by the *certiorari*, without *mittimus* from the Chancery, upon these precedents, *Reg.* 209. *F. N. B.* 242, 246. *B.* 190. *F. Reg.* 160, 285. and *F. N. B.* 243. *Secondly*, That it being in this Court, this Court shall execute it notwithstanding *Hutt.* 117. *Risham v. Goodwin*, that

†

this

Scire-facias against tenants in possession quia ingressi sunt, without shewing title.

this Court shall not execute the judgments of inferior courts, and this resolution was grounded upon *Pasch. 22 H. 7. Rot. 369. Rastall's Entr. 531. Ashton's Placita Rediviva, 145. Mich. 3. Jac. 1. B. R. Rot. 2311. Hil. 3. Jac. 1. Co. B. Rot. 1819. Pasch. 4 Jac. 1. B. R. Rot. 337. Bre. Judicialia, 130. Hil. 9. H. 4. Rot. 130. Thesaurus Brevium. 40, 41, 42. Rast. Entr. 169, 192. Co. Entr. 180, 342. Reg. 170. F. N. B. 242, 243. Thirdly, That the *scire-facias* was good, without shewing by what title *Forth* entered. And this upon *Rast. Entr. 6. Moyle, 160. 2 Bro. 110. Bre. Judicialia, 155. 253. Rast. Entr. 279. 452. Reg. Judic. 20. 50.* and generally in recoveries in real actions, the *scire-facias* is against *tales* and *tales qui ingressi sunt*. Fourthly, It was resolved by all the Justices, that the plaintiff shall have judgment to have execution, and not *respondeas ouster*, because although the conclusion of the demurrer is in abatement, yet the beginning being in bar, the judgment shall be peremptory, *Mich. 15 Car. 2. B. R. Rot. 703.* and so it was, and the plaintiff had execution.*

Norton and *Levinz* for the plaintiff *Cole*, throughout this cause. *Finch, Jones*, and others for the defendant.

It was held by the Court that a new trial cannot be granted in an inferior court; for they are not like trials by *nisi prius*, which are subordinate upon writs issuing out of this Court, over which the Court have authority and inspection; but this was a new trial a year after the first, which the Court blamed.

B. R. executes judgments given in inferior courts.

Plea beginning in bar, although it concludes in abatement, judgment peremptory.

The case of the Mayor and Aldermen of Bristol, *Mich. 1 Ann. B. R. 2 Salk. 650. S. C. Fares. 84. 85. 1 Salk. 101. pl. 4.*

No new trial in inferior courts. See *vide post*.

YORKE

Brooke v.
Ewers & ux.
M. 5 G. in B. R.
1 Stra. 113.

Mandamus in
nature of a pro-
cedendo ad ju-
dicium.

A judge of an
inferior court
cannot grant a
new trial. See
vide post.

YORKE moved for a *mandamus* to the Judge of the Court of *Sandwich*, to give judgment upon a verdict, though he had granted a new trial for excessive damages, without payment of costs.

And for the *mandamus* he quoted 1 *Ven.* 187. *Raym.* 214. 2 *Keb.* 871. And he likewise insisted, that a judge of an inferior court cannot grant a new trial, as was held by *Holt, C. J. Mich.* 1 *Ann. Hall v. Hill.* 1 *Mod. Ca.* 84. *Salk.* 201. 650. And likewise by *Parker, C. J. Pasf.* 12 *Ann. Page v. Round.*

And to that opinion the Court inclined, and granted a *mandamus* unless cause, and upon that the Judge below, as well advised, *quirit.*

Rex v. Peters
et al', or Cavil v.
Burnaford et
al', E. 31 G. 2.
B.R. 1 Burr. 568.

An inferior
court may set
aside a regular
interlocutory
judgment, for
the purpose of
trying the me-
rits.

Mr. *Hussey* shewed cause against the issuing of a *mandamus*.

A motion had been made by Mr. *Whitaker* (on 13th February 1758) for a *mandamus* to be directed to the defendant *John Peters*, the county clerk (who was the steward of the court) and also to the free suitors of the county-court of the county of *Cornwall*, commanding them to *proceed to final judgment* in a certain cause by plaint in replevin, commenced in the said county-court, between *John Cavil* plaintiff, and *John Burnaford*, *Anthony Pomery*, and *Nicholas Pelyne*, defendants; in which cause the said *John Cavil* obtained an *interlocutory judgment* in the said county-court.

The case, in short was—That *Burnaford* distrained *Cavil* for rent; *Cavil* brought a replevin, in the county-court of *Cornwall*; an INTERLOCUTORY JUDGMENT was regularly entered; and a writ of inquiry of damages executed thereupon; and 2*d.* assessed for damages,

mages, and 5 s. for costs, and so much more costs as the Court should allow.

This *inquisition* was set aside for *irregularity* (*viz. want of notice* of executing the writ of inquiry.)

The defendant's advocate there then moved
 " To *set aside* the said (regular) INTERLOCU-
 " TORY JUDGMENT *itself*; UPON the defend-
 " ant's *paying the costs of entering it*," (to be
 taxed by the STEWARD) and on avowing *issu-
 suably*: and afterwards, on a subsequent mo-
 tion " to make such rule absolute," it being
 urged by the other side, " that that court had
 " no power to set aside a *regular* judgment,"
 the Judge took time to advise. At a future
 court, after inquiry from ancient practisers in
 the said court, and being informed that it had
 been *the constant custom and usage of it* " To
 " SET ASIDE interlocutory judgments any time
 " *before executing writs of inquiry therein*, ON
 " the defendant's paying the costs of entering
 " the same judgments, and pleading *issuably*
 " to such actions *instante*;" and after having
 fully considered the affair in all its circum-
 stances; and apprehending it to be agreeable
 to the practice of *this* Court; he declared his
 opinion " that *it ought to be set aside*, and the
 " defendant's avowry received, they having
 " paid the costs, at the time of filing it *de*
 " *benè esse*," (which had been done in the in-
 terim): and accordingly he made a rule, thus
 —" *Cavil v. Burnasford et al*'. It is ordered,
 " &c. That the interlocutory judgment en-
 " tered in this cause *be* SET ASIDE, on pay-
 " ment of costs taxed; and that the avowry
 " filed in this cause *de benè esse*, last court-
 " day, be now, on consideration of the Court,
 VOL. III. X " made

"made absolute: and therefore rule for the plaintiff in replevin to plead in bar to the avowry."

And the Judge of this inferior court swears "That he acted with the utmost impartiality in the affair, and according to the best of his judgment and understanding; and, he apprehends and believes, according to the CONSTANT USAGE AND PRACTICE established and observed in the said court."

Mr. *Whitaker's* motion was grounded upon the inferior judge's having exceeded his authority. And he had cited 2 *Strange*, 823. *Fox v. Glasf.* H. 1728. 2 G. 2. as the first time that even this Court had set aside REGULAR judgments; and 1 *Strange*, 392. *Bayly v. Boorne*, M. 7. G. 2. where they doubted of an inferior judge's having such power.

On Friday last (21st April, 1758) Mr. *Hussey* shewed cause why this *mandamus* should not issue. And he made the two following questions.

1st. Whether the judge or steward of an inferior court has a right to SET ASIDE interlocutory judgments REGULARLY obtained?

2d. Whether in this particular case, the steward of this inferior court had a right to do as he had done, and as is the practice of that inferior court?

As to the first question, He agreed they cannot grant new trials, 1 *Salk.* 201. *Regina v. Hill, et al'*, and 2 *Salk.* 650. the case of *Bristol* (which is S. C.) *Brooke v. Ewers, et al'*, 1 *Strange*, 113. S. P. A *mandamus* issued to a judge of an inferior court, "to give judgment:" though he had granted a new trial. Therefore he would not contend that an inferior

V. ante.

V. ante.

ferior court has a right to set aside a *regular* judgment, UNLESS it be to let in the *merits*. But they may do it *in order to TRY THE MERITS*, 2 *Salk.* 650. In the case of the mayor and aldermen of *Bristol*, it was holden "that *an inferior court could not grant a new trial.*" However, it was long since done by *this court*: and they would also *formerly* set aside *regular judgments*, on putting the plaintiff in as good condition as before. And it does not appear how the Court came to leave it off; as Sir *John Strange* says (in the case of *Fox v. Glas*) that they had done.

V. ante.

And it seems right in itself, and agreeable to natural justice, to permit inferior courts to set aside regular *interlocutory judgments*, in order to let in a trial of the *MERITS*. Indeed it is reasonable, *not* to permit them to set aside the *verdicts of JURIES*: which is an exceedingly different case from a judgment by default.

As to the 2d question,—In the *present* case, the steward acted rightly and reasonably, upon the circumstances attending it. Mr. *Whitaker*, *contra*, for the *mandamus*.

The *letting in the trial of the MERITS*, makes *no difference*. I say that an inferior court can *not* set aside a *regular judgment* after they have *once exercised their authority*. In 1 *Strange*, 392. *Baily v. Boorne*, M. 7. G. 2. B. R. the Court thought it a question that deserved consideration, "Whether the judge of an inferior court *could* do it." And there is no more reason why they should have *this* power, than that of setting aside *verdicts*. They have no such *discretion*. "*Discretion*" is another word for "arbitrary will."

LORD MANSFIELD denied this interpretation

of the term *discretion*; and referred to what was said (a few days ago) in the case of *Rex v. Young*, and *Pitts* (vide 1 *Burr.* p. 560. and 561, 562.) And he said that *DISCRETIO* is, as Lord *Coke* says, “discernere *per legem* quid “sit justum.”

To which observation, Mr. *Just. Wilmot* desired to add another, from 5 *Co.* 100. *a. Rooke's* case: “*DISCRETION* is a science and understanding of distinguishing and discerning between falsehood and truth,” &c. &c. and NOT to do “according to *arbitrary will* and *private affection*.”

Mr. *Whitaker*.—But these inferior judges have *no sort* of discretionary power of *any kind*.

Lord *MANSFIELD*.—That case of *Baily v. Boorne*, in 1 *Strange*, 392. only says “That it “was a question that deserved considera- “tion.”

But there is *no precedent* or *authority* to the contrary of their having such a power. And it seems a power *necessary to the exercise of judicature*; and is very different from the case of setting aside *VERDICTS*.—This power to set aside *interlocutory judgments*, seems *incident to justice*.

However, both Lord *Mansfield* and the other * two judges, thought it might not be amiss to look into it. And—

Mr. *Just. Denison* intimated as if there was something of this sort before the Court, in † *P.* 28 *G. 2. B. R.*

CUR' advisare vult.

And now Lord *MANSFIELD* delivered the opinion of the Court; having first desired Mr. *Hussey* to state the case, for the sake of the stu-

* Mr. Justice Foster was absent.

† It was in Hil. 1754. 27. and P. 1755. 28 *G. 2. Eastwell v. Livermore.*

dents: (for he took this opportunity of observing and declaring "That nothing *misleads* " so much as reporting the determination of " courts of justice, without having a sufficient " and *correct state of the case*:" which, he said, was only an *ignis fatuus*, leading people into an error and mistake).

Here, the question, upon the *true* state of the case (which *v. ante*) appears to be "Whether an INFERIOR court has power to SET ASIDE a REGULAR INTERLOCUTORY judgment, in order to let in the trial of the MERITS."

And we are all of us of opinion, "That they HAVE such a power." There is no authority nor even *dictum*, to the contrary; nor is there any reason why they should not have such a power; which is *incident* to the doing of justice.

Indeed there are authorities which say, "That an inferior court can not grant a NEW TRIAL, or set aside the VERDICT of a JURY, but for irregularity."

But there may be many reasons why they may be permitted to set aside an *interlocutory* judgment, in order to let in the *merits*; which reasons will not hold so far as to make it allowable for them to set aside the *verdict of a jury*: (one of which reasons may be, "that no *attaint* lies upon a verdict given in an inferior court,") and indeed the setting aside a *verdict of a jury*, is too great power to be intrusted to an *inferior* jurisdiction. Yet

We are, all of us, clearly of opinion "That they may set aside *regular* INTERLOCUTORY judgments, in order to let in the *merits*;" both upon the *reason* of the thing, and for the convenience attending it.

That case in 1 *Strange*, 392. of *Baily v. Boorne*, proves nothing at all against this. And in 1 *Strange*, 499. *Jewell v. Hill*, H. 8 G. 1. an inferior judge set aside *even a verdict*, for *irregularity* (or rather for surprize) which this Court allowed he might do.

Mr. Just. *Denison* added, that in the case of *Eastwell v. Livermore*, it seemed to be understood and agreed at the bar, "That an inferior court could not set aside a verdict, * AT ALL:" but he finds that he has written a note at the bottom of that case, importing that *he himself* thought that it ought not to be taken for granted, *so generally* as this is laid down, "That they cannot do it * at all;" for that he thought "that an inferior court *may* set aside *even a verdict* for IRREGULARITY; though they are not to be trusted with a power of setting aside *verdicts upon the MERITS.*"

And *this*, he said, was certainly the RIGHT *distinction*; viz. That they *may* set aside even verdicts, *for irregularity*; but *not* upon the merits.

Wherefore *per Cur.* unanimously,

Let the RULE made "That *John Peters* the county-clerk, and the free suitors of the county-court, should shew cause why a *mandamus* should not issue, directed to them, commanding them to proceed to final judgment in a certain cause by plaint in replevin commenced in the said county-court, between *John Cavil*, plaintiff, and *John Burnasford*, *Anthony Pomery*, and *Nicholas Pelyne*, defendants, in which said cause the said *John Cavil* obtained an interlocutory judgment in the said county-court, on

" the

* It is true that there was no distinction expressed in the discussion of that case. But no irregularity was there pretended; nor any other reason attempted to be given for setting aside that verdict, but because it was a hard one, and such as ought to be set aside.

" the 12th day of *October* last;" — *be* DIS-
CHARGED.

RULE DISCHARGED.

N. B. In the case of *Blackquiere* and others,
assignees of *Sampson* and another, *v. Hawkins*,
assignee of *Wooldridge* a bankrupt, *Doug.* 365.
per Lord Mansfield, Inferior courts cannot
grant a new trial. This must be understood
in a limited sense. *Vide* the case preceding.

IX. Of other Matters respecting new Trials, &c.

(21.) Of withdrawing Pleas, Replications, Demurrers, &c.

Nichols v. Sutcliff, T. 7 G. 2. B. R. Ann. 56.

Motion to withdraw plea of nihil debet, and plead non assumpsit; granted in the common terms.

IN an action on the case on *assumpsit*, it was moved on behalf of the defendant for leave to withdraw the plea of *nihil debet*, which he had put in, and to plead *non assumpsit*. The following cases were cited to shew that the Court had granted this liberty before: *Edes and Mason, Pasch. 5 Geo. 2. B. R.* moved to withdraw the general plea *non assumpsit*, and to plead a *tender* as to part, and *non assumpsit* to the rest, and granted. In the case of *Mostyn and Totty, 3 Geo. 2. in Scacc.* the Court gave leave to withdraw demurrers, and plead the general issue.

Granted on the common terms of payment of costs, and taking short notice of trial.

Jeffereys v. Walter, M. 21 Geo. 2. B. R. 1 Wils. 177.

Leave given to withdraw non est factum to a bond, and to plead the statute of gaming. V. post. Taylor v. Joddrell.

Rule for the plaintiff to shew cause why the defendant should not have leave to withdraw his plea of *non est factum* to a bond, and to plead the *statute of gaming*, upon payment of costs, taking short notice of trial, and giving judgment of this term in case there be a verdict for the plaintiff, grounded upon an affidavit

davit that instructions had been given by the defendant to his attorney to insist upon the *statute of gaming*; and the attorney apprehending that he could give *that statute* in evidence on *non est factum*, did not plead the *statute* specially. It was objected for the plaintiff that this had never been done, that the defendant had been guilty of an affected delay by exhibiting a bill in Chancery against the plaintiff for a discovery, relief, and injunction, to which he had put in his answer, that the defendant first pleaded *nil debet*, which he would not stand by, and then pleaded *non est factum*, and an injunction with liberty to proceed to judgment was granted in Chancery.

PER CURIAM, (*absente Cap. Justic.*) The Court will not give leave to withdraw the general issue, and plead specially where it is to the prejudice of the plaintiff, or where there has been an affected delay; in this case it appears by the answer in Chancery that the defendant has a good defence at law, and here is no affected delay. In the case of *Malters and Shelmandine*, *Mic. 15 Geo. 2.* leave was given to withdraw the general issue Not Guilty, and plead a justification, upon the like terms as in the present case; and they said they remembered several other cases where the like had been done by the Court; so the rule was made absolute.

TRESPASS: the defendant justified for toll at *Hounslow*, and pleaded two pleas in *Hilary* term last; and in this term, after issue joined, obtained a rule to shew cause why he should not have leave to amend his two pleas, and to add a third plea. Upon shewing cause, Mr. Ford objected to adding the third plea, because

Waters v. Bovell, T. 21 & 22 Geo. 2. B. R. 1 Will. 223.

Leave given to add a plea after two terms since the first pleas were pleaded, and after issue joined.

because it was now *two* terms since the defendant pleaded; and compared it to the course of the Court not to give a plaintiff leave to add a count after *two* terms.

But *per Curiam* (absente *Wright, J.*) the rule must be absolute upon paying costs, both as to amending the two pleas, and adding a third; for there is no time limited for application to the Court to plead several pleas; the reason why a plaintiff must apply for leave to add a count within *two* terms, is because he is obliged to declare within *two* terms, otherwise he will be out of Court, and a new count is considered as a declaration; and the plaintiff's being refused after *two* terms to add a count, is not under such difficulty as the defendant would be if he were refused to add a plea after *two* terms, because the plaintiff may have a new action.—Serjeant *Draper* for the defendant.

Taylor v. Jodrell, M. 23 G.
2. B. R. 1 Will.
254.

The defendant permitted to plead a special justification after he had pleaded the general issue, upon terms.

Vide ante.

Vide ante.

IMPRISONMENT : defendant pleaded the general issue inadvertently, and now moved to withdraw it, and for leave to plead a justification that he was master of a ship, that the plaintiff was making a mutiny therein, and so he imprisoned him; this was done in *Blackburn v. Matthews*, upon terms of taking short notice of trial. And in *Tarlton v. Wragg*, Trin. 20 Geo. 2. defendant pleaded the general issue, and wanting afterwards to pay money into court, the defendant had leave to withdraw his plea, pay money into court, and plead the general issue again. In Trin. 21 Geo. 2. *Water v. Bowell*, the defendant in Hilary term before having pleaded two pleas, had leave in Trin. term following to plead a third plea; and in *Mic. 21 Geo. 2. Jeffereys v. Walter*, leave was given

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given to withdraw *non est factum*, and to plead the statute of gaming.

Per Curiam: There are many instances of this having been done when the Court can prevent the plaintiff from suffering any inconvenience by it, as by obliging the defendant to take short notice of trial, and that, if there be a verdict for the plaintiff, he shall have judgment as of the present term; therefore let the defendant be at liberty to plead a justification, and the general issue also, if he pleases, upon the terms mentioned.

Mr. Norton moved for leave to withdraw two demurrers, and plead to issue (upon payment of costs); and a RULE was thereupon granted, to SHEW CAUSE.

And now Mr. Yates shewed cause, for the plaintiff, against the defendant's being at liberty to withdraw the two demurrers, and plead to issue. And he cited 6 *Mod.* 102. *The case of Crofs v. Bilson* (a), 6 *Mod.* 1. The case of *Staple v. Haydon* (b), 1 *Ld. Raym.* 668. The case of *Fox v. Wilbraham*, and 2 *Strange* 1002. (c) *The Bank of England v. Morrice*.

Serjeant Poole, and Mr. Norton *contra*, for the defendant.—

The merits have not been tried upon these demurrers. We move this at *common law*, not under any statute. And the Court are not bound down by any certain rules. And they cited 2 *Saund.* 402. *Rex v. Ellames* [2 *Strange*, 976]. *Dutchess of Marlborough v. Widmore*, *Hil.* 4 G. 2. B. R. The case of *Cope v. Marshall*, *Tr.* 28 G. 2. B. R. [V. 1 *Burr.* 259, S. C.]

The case of *Giddins v. Giddins*, [Tr. 29, 30 G.

Robinson v. Raley, T. 25 Geo. 2. Rot. 10. 775. E. 30 Geo. 2. B. R. 1 *Burr.* 321.

Motion for leave to withdraw two demurrers, and plead to issue, upon payment of costs, refused, because several issues in fact had been tried.

(a)
V. post Essay
V.

(b)
V. post Essay
V.

(c)
V. post Essay
III.

* It was after a demurrer and argument only; but the Court had given no opinion; and the rule was made absolute without defence.

30 G. 2. B. R.] was even after the Court had given their opinion*.

And here is a declaration of twenty counts, manifestly intended to catch the defendant, and to save costs.

If our motion is granted, the *contingent* damages assessed, will be out of the case, and will be as none at all.

Lord MANSFIELD,—It is admitted to have been done *after a DEMURRER and argument*: but this is *after a TRIAL*, and *without any favourable circumstances*.

Now as no case of such an amendment *after a TRIAL* is cited, I take it for granted that *none EXISTS*.

These are frivolous demurrers; and the only view of this motion is *to get rid of the costs*. But the plaintiff would have had his costs, if the defendant had done right at first, and joined issue upon these facts, *if they had been found against him*.

So that here is neither precedent, nor reason for allowing this motion.

Mr. Justice DENISON concurred.

Where the demurrer is first argued, *before* any trial of the issues, the court will give leave to *amend*: as in the case of *Giddins v. Giddins*. But this is an attempt to amend an issue at *law*, *AFTER a verdict* has been found on the issues *upon FACTS*, and *contingent damages found upon the demurrers*: of which there *never was an instance*. And we do not know where it would end; nor do I well know how the cause *could* be again carried down to trial. If this had at first gone down to issue, and had been found *against* the defendant, it would have carried costs.

The Court cannot help seeing that this is
upon

upon RECORD : here are *verdicts* and *contingent damages* found, therefore we cannot help this : I wish we could ; because the merits seem to be with the defendant.

The cases of amendment cited are where the whole is supposed to be *in* PAPER ; or else the Court COULD NOT *have done it*. We have no authority to do this, AFTER 'tis plainly *upon* RECORD. Mr. Justice FORSTER concurred.

Per Cur' unanimously JUDGMENT for the PLAINTIFF upon the DEMURRERS.

After issue joined upon a plea in bar to an avowry, the Court would not suffer the plea to be withdrawn, and the avowry confessed, without consent, as the avowant would lose his costs. *Skin.* 594.

In the case of *Collins v. Blantern*, 2 *Wils.* 341. C. P. refused to let plaintiff withdraw a demurrer to the defendant's plea, and take issue ; but this was after two arguments.

Vide ante, L. E.
Intro. (k).

Mr. *Hussey* shewed cause against a rule of Mr. *Gould's*, " why the plaintiff should not " be at liberty to *withdraw his replication*, and " *reply de novo*."

Alder v.
Chipp, H. 32
Geo. 2. B. R.
2 Burr. 755.

The case was, that the plaintiff had (by the mistake of his former attorney) traversed a lease under which he himself claimed.

Withdrawing
a replication
and replying *de*
novo, considered
as an amendment.

The Court made the rule absolute.

And Lord MANSFIELD said, he considered this as an *amendment*, and that the proposing it in this method of withdrawing the replication and replying *de novo*, was only to prevent the defacing and obliterating the roll. And he observed, that the Court had not used the same *strictness* of late years, with regard to *amendments*, as they formerly did : and he said, it was much better for the parties that they should

not :

not : however, the Court would always take care that if one party obtained leave to amend, the *other* party should not be *prejudiced nor delayed* thereby.

• 2 Stra. 1102.

And he observed that the case of the * Bank of England v. Morrice, turned upon its own particular circumstances, and was the case of an *executrix* too.

Note,—The length of time in the present case had been objected ; *viz.* six terms. But it was answered, “ that in many cases, amendments had been made after a much longer time.”

Rule made absolute.

Wilkes, Esq.
v. Wood, Esq.
member of parliament, M.

4 Geo. 3. C. B.
10th of November, 2 Wils. 204.

Leave to withdraw the general issue, and plead a special plea upon terms, and waiving privilege of parliament.

V. ante.

In trespass, assault, and imprisonment, the defendant pleaded the general issue, whereupon issue was joined last term, and notice of trial given for to-morrow the 11th of November. On Monday last the 7th of November, the defendant moved for leave to withdraw his plea of the general issue, and to plead again the general issue, and a special justification under a warrant of Lord Halifax, secretary of state ; and relied upon the case of Taylor v. Jodrell, B. R. Mich. 23 Geo. 2. where, in imprisonment, the defendant had pleaded the general issue, the Court gave him leave to withdraw that plea, and plead a justification that he was master of a ship, that plaintiff was making a mutiny therein, and so he imprisoned him, upon terms of taking short notice of trial, and giving plaintiff judgment of the same term. The like was done in Blackburn and Matthews, Trin. 23 Geo. 2. B. R. and in many other similar cases, where the Court could prevent the plaintiff from being delayed, or suffering any inconvenience.

Serjeant *Glynn* for the plaintiff, objected that the defendant could not, by coming into the usual terms, put the plaintiff into the same situation he was now in, the privilege of parliament taking place next *Monday*; whereupon defendant agreed to waive his privilege; but it was answered by *Glynn*, that the privilege of a member was the privilege of the whole house, and that he could not waive it without leave of the house; and that the house might insist upon the privilege.

CURIA. We will not suppose any thing so dishonourable in the House of Commons: let the rule be made absolute upon defendant's taking short notice of trial, and that if the plaintiff has a verdict, he shall have judgment of this term.

Wilkes against *Webb*, Esq. member, &c. the like motion, and the like rule. 2 Will. 205.

This was a special action upon the case against the defendant, for deflowering the plaintiff's daughter *per quod servitium amisit*: the defendant having pleaded the general issue, now moved for leave to withdraw that plea, and to plead the same plea again, together with the plea of the statute of limitations; upon an affidavit made by the defendant's attorney, that at the time when he was bound to plead by the rule of the Court, and then pleaded the general issue only, he was not fully instructed by his client what to plead; and a similar case was cited in B. R. of *Vile v. Barry*, wherein the Court permitted *this*, upon an affidavit made by the very same attorney, that he was pressed for a plea, and was obliged to plead before he was instructed, and therefore pleaded

Cox v. Rolt,
T. 5 Geo. 3.
C. B. 2 Will

253.

Practice.
The Court refused to permit a defendant to add the plea of the statute of limitations.

pleaded the general issue to prevent judgment.

Upon shewing cause it was insisted for the plaintiff, that the general rule of both the courts of B. R. and C. B. is to permit a defendant to withdraw a special plea; and plead the general issue, but not *vice versa*; and many cases were cited to shew this to be the practice, which was agreed to be so by the Court; and it was said, that in the case of *Vile v. Barry*, the attorney was surprised, not instructed, and pleaded the general issue to prevent judgment: and for that reason the Court of King's Bench deviated from the general practice in that particular case; but here the affidavit made by the same attorney does not go so far, and therefore the rule ought to be discharged.

CURIA. It is a good maxim, that the law will rather suffer a particular mischief than a general inconvenience; general rules of practice must be strictly observed for the sake of certainty, or practisers will be negligent. Indeed under very special circumstances, the Court will permit a defendant to add a special plea; in a late case of public concern, the defendant being advised by his counsel that he might give the secretary of state's warrant in evidence upon the plea of the general issue, pleaded *that* plea only; the judge before whom that cause was tried, having been of a contrary opinion, it was afterwards moved in a similar case of *Wilkes v. Webb*, to withdraw the general issue, and plead the same plea again, and a special justification under the secretary of state's warrant, which was allowed by the whole court; the defendant at the time of pleading the general issue only, being ill advised

Vide ante.

advised by his counsel, and not knowing then the opinion of the judge who tried the former similar cause; besides, *that* special plea was allowed to try the real merits of the case, but the plea of the statute of limitations is not to be favoured, because it excludes the merits; the Court gives leave to add a plea for the furtherance of justice, but to permit this plea of the statute of limitations, would not be so. The rule was discharged *per totam Curiam*.

Serjeants *Hewitt* and *Davy* for the defendant, Serjeant *Burland* for the plaintiff.

Action upon the statute for selling coals short in measure, to recover £.50. penalty. The defendant last term pleaded a recovery in B. R. for the same offence, and now he moved to withdraw *that* plea, to plead the general issue, and take short notice of trial; but *per Curiam*, the defendant has delayed the plaintiff by this sham plea, he has produced no affidavit that he has any merits, and deserves to pay the £.50. for pleading a sham plea, so the rule must be discharged.

Ellis qui tam,
&c. v. — H.
8 G. 3. C. B.
2 Wils. 369.

Where a defendant pleads a sham plea, the Court will not let him withdraw it and plead the general issue.

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E S S A Y III.

Of Special Verdicts, &c.

IN the case of *Hayward v. Fulcher*, Trin. 21 Jac. Rot. 662. *Palmer*, 491—505, in trespass, judgment was given for the defendant by reason of the uncertainty of the verdict, Uncertainty of the verdict.

Where a special verdict is good because it is true, the Court must adjudge the law upon the truth, and are not bound by the finding of the Jury.

In ejectment in B. R. in this cause, the special matter was found as follows, viz. that *William Humfryson*, who was seised in fee, suffered a common recovery to *Simmerton* and *Fulke*, M. 28 H. 8. to the intent that they should grant an estate to him and *Elinor* his wife, for their lives, the remainder *seniori puero* of the body of the husband in tail, the remainder over in fee to one *Kinersley*: the recoverors made a feoffment accordingly Anno, 2 E. 6. and afterwards *Humfryson* covenanted by indenture with the said *Kinersley*, to levy a fine with his wife, to the use of himself and his wife for their lives, the remainder *to the use of the eldest child of his own body in tail*, the remainder in fee to *Kinersley*; which fine Anno, 3 E. 6. was levied accordingly with general warranty; and the feme died, and *Humfryson*

Lane v. Cowper, E. 17 Eliz. Mo. 103. n. 248. Recovery suffered to certain uses, remainder to *seniori puero*.

Covenant to levy a fine, with his wife, to uses, remainder to eldest child of his own body in tail, remainder in fee to K. Fine levied. Feme dies, covenantor

takes another wife; hath issue, first a daughter, afterwards a son, who, within age, leases to the plaintiff, without reserving rent: defendant, as servant to the daughter, entered upon the lessee.

Uses,

Remainder.

took another wife, by whom he had issue, first a daughter, and afterwards a son, and died: the son, within age, made a lease to the plaintiff, as in the declaration is alledged, but no mention in the verdict of any rent reserved; the defendant, as servant to the daughter, entered upon the lessee; and so, &c. upon the whole matter, if it should seem to the Court that the entry of the daughter was lawful, the jury found the defendant not guilty; but if it should seem to the Court that the entry of the daughter upon the lessee of the son was not lawful, they found the defendant guilty, and assessed costs and damages: upon which verdict so returned, it was often argued at the bar, and by the bench, and at last by all the justices in bank openly: and it was divided into *ten* points.

The 1st. To what uses the recoverers are seised as to the execution of the estate again to *Humfryson* and his wife: and as to this, all the Justices argued that they were seised to their own use, by the intent of the recovery, because otherwise they could not rightfully make an estate to him who suffered the recovery again, as they ought to do.

The 2d. If *seniori puero* be a good name of purchase by way of remainder, he not being in *rerum natura*, at the time of the limitation. And in this also they all agreed that it is a good name of purchase: and *Gawdy* and *Wraye* put the diversity, (*viz.*) that a person not in being at the first, may take a remainder by purchase, if he be *in esse* before the particular estate determined, so that the limitation of the remainder be in general words, as to the right heirs of *J. S.* or to him who shall first come to *St. Paul's*, to the wife that shall be, and the like. But if the limitation be in special

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cial words, as to *Jane*, the first wife of *J. S.* where he hath not any wife at the time, or to the mayor and commonalty of *Islington*, where there are not any such at the time there, although before the determination of the particular estate, *J. S.* takes one *Jane* to wife, or *Islington* be incorporated by the name of the Mayor and Commonalty, yet they shall not take the remainder.

The 3d. If the remainder shall be in abeyance until the birth of a son, or whether the estate tail shall be executed in the father until the birth of a son: and in this also they all agreed that the remainder is in abeyance, until the tail executed, and vouched 30 *Aff. Stafford's* case, where the remainder was limited *propinquioribus de sanguine*, and 1 *Aff.* to the wife that shall be.

Remainder in
abeyance.

The 4th. If by the fine the remainder which followed the estate in abeyance was put to a right, or whether it should be preserved from tort, by the law: and as to this, *Gawdy* and *Wraye* agreed that the remainder in abeyance is preserved, and the estate is not converted into a right by the fine of the particular tenant; and they compared this to descents and non-claims in the time of vacation of a bishoprick, which shall not prejudice the successor; nor non-claim where land is in the hands of the king by guardianship; because in the one case there is not any person to make claim; and, in the second, claim cannot be made upon the possession of the king.

The 5th point. If the warranty being collateral shall bind the remainder in the son: and it was argued by all that it should not, because, admitting that the remainder settled upon the son by the name of *seniori puero*, then if afterwards,

Warranty.

terwards, when he is born, he takes the possession in remainder, that this being before the descent of the warranty, avoids the warranty: besides, the fine is not a discontinuance of the remainder, because it was in abeyance, and therefore there is not any reason that the daughter should have the benefit of the warranty, because she is in as him who hath an use *en le post*.

Puer.

The 6th point. If by the words *seniori puero* shall be understood the daughter who was first born, or the son who is the male: and in this the Justices unanimously agreed, that the word *puer* is common as well to the female as the male, and may be taken for both in grammatical construction, and exposition of the civil law: but the best interpreter of the intent in this limitation, is the father himself who made the limitation, and he hath explained by the indenture that the remainder should be to his eldest child; and therefore the Justices all agreed that the daughter is to take the remainder; but *Wraye* said, if the indenture had not been made, then the Justices ought to expound the word *puer* according to the most common intent, which is to signify a male child. *Southcot* è *contra* as to this, because the daughter being the first upon whom the remainder is aptly enough settled before the birth of the son, she shall be preferred for her priority.

Infant.

The 7th. If the lease of an infant, without rent reserved, be *void* or *voidable*: and they all, but *Gawdy*, agreed that it is *void*, because he had not any consideration, but if rent was reserved, it would be only *voidable*. So a feoffment made with the proper hand of an infant is only *voidable*: and they said that any

stranger

stranger may take advantage of this by way of allegation, evidence, or otherwise.

The 8th. If any averment lies by the daughter against the fine, to say that *seniori puero* in the fine means the eldest child. And they all agreed that it did, because it was with [ove] the fine to add matter which should explain the words of the fine one way or another.

Averment.

The 9th. When the Jury find, that if the entry of the daughter was *not lawful*, the defendant is guilty; if the Judges ought so to adjudge him guilty if they find the entry *not lawful*, when in truth it appears to the Justices, by the other matters found, that he cannot be guilty of the *ejectment*, because the lease was *void à principio*. And in this they all agreed, that the Justices are not bound by the conclusion of the Jurors, but may adjudge according to law: and they cited 34 *Aff.* where the jurors found a release of an infant, and concluded, and so no *disseisin*. So 10 *E. 4. fo. 7. trespass* against the lord for distraining, the Jury found for the plaintiff; but because the stat. of *Marlbridge* is *non ideo puniatur dominus*, &c. the Court adjudged for the defendant. So 9 *E. 4. fo. 3. a. Tilly and Wooddye's case*.

Verdict.

The 10th point. If the verdict was imperfect in finding the daughter *primogenitam filiam*; and the son *secund' genitum filium*: and they all agreed that the verdict was good, because it is true, and the Court is to adjudge the law upon the truth. And so, at length, judgment was given *quod querens nihil capiat per billam*.

Where the jury find matter against law, the Justices will not take notice of it, but will adjudge according to law.

Lee v. Lee,
M. 30 & 31
Eliz. Exch.
Mo. 268. n. 420.
Devise.

The deviser hath three sons, F. J. & G. He devises to J. for twenty-one years, for certain purposes, and makes J. executor. If J. die within the term, G. (the plaintiff) to have the like term, and G. to be executor. Devise of the land over to F. in tail, remainder in tail to J. remainder in tail to G. J. entered, F. died without issue. J. had issue P. the defendant, and died within the term, upon which G. entered, and P. ousted him.

Qu. If by the descent of the estate of inheritance to J. being in possession of the term, the term was extinct?

Upon an *ejectment* by *George Lee v. Patrick Lee*, it was found by verdict, that *Vincent Lee* was seised of land in *Denbigh*, in the county of *Denbigh*; and having three sons, viz. *Francis*, *Jasper*, and *George* the now plaintiff, made his will, whereby he devised the land to *Jasper* for twenty-one years, to the intent of performing his will, and paying his debts, and he also made *Jasper* executor; and if *Jasper* died within the term, he willed that *George* the now plaintiff should have the like term as he had given to *Jasper*, and that *George* should also then be his executor. And he devised the land over to *Francis* in tail, remainder in tail to *Jasper*, remainder in tail to *George*, and died. *Jasper* entered, *Francis* died without issue: *Jasper* had issue *Patrick* the defendant, and died within the term; upon which *George* entered, and *Patrick* ousted him. And if by the descent of the estate of inheritance to *Jasper*, being in possession of the term, the term was extinct, they found an *ejectment*. And it was argued by *Cowper* and *Piggot* upon the point, to wit, if the possibility limited to *George* the plaintiff, was prejudiced by the extinguishment of the term in *Jasper*, and the books were cited. And the Court agreed if a term for years be devised to one, and if he die within the term remainder to another, that by descent of the inheritance to the first, unity of possession, his grant, or his forfeiture, the remainder is defeated. But *Manwood* said, and all the Court agreed, that if lands be devised for years to one,

and

and if he die within the term, that another shall have the residue of the term, that no act of the first can prejudice the remainder in the second; but, *per Manwood*, it is otherwise if one who hath a *term* devise his *term* with such remainder. And the reason of the diversity was, that if he devise the *term*, it is all one complete estate, because power is given to the *first* devisee, over all the term for a certain time; but it is not so where the *land* is devised, for which reason their opinion was against the defendant, and with the plaintiff that he should recover: but the judgment was respited. And it was moved, that the verdict found that if the term was extinguished in *Jasper*, it was an *ejectment* to *George*, and it was clearly extinguished in *Jasper* for his time, by which the verdict found for the defendant. And the Justices said, that where the jurors find matter against law, the justices will not take notice of it, but will adjudge according to law.

Verdict.

Of a small variance in a corporate title: of granting a lease by a corporation for the purpose of bringing an ejectment: also of demanding rents.

Ejectione Firmæ. It was found by verdict, that the Dean and Chapter of *Exeter* let the land to *Harvy* for years, rendering rent payable at their chapter-house in *Exon*, and for default of payment, the lease to be void. *Harvy* assigneth his estate to the defendant, the rent was in arrear, and not paid, being demanded at their chapter-house. The dean and chapter, by the name of the Dean and Chapter of *St. Mary de Exon* (whereas they were

Willis v. Jermin, Hil. 31
Eliz. Rot. 674.
Cro. Eliz. 167.

Variance.

were incorporated by the name of *St. Mary in Exon*) make an indenture of lease for twenty-one years to the plaintiff of the land, and in their chapter-house put their seal to it, and make a letter of attorney to *J. S.* to enter and make delivery of this deed upon the land, which he did accordingly; and if this be a good lease, they pray the opinion of the Court.

- Harris*, Serjeant, prayed judgment for the defendant. *First*, The lease of the land is void by *misnomer* of the corporation, *sed non allocatur*; for it is no material variance, and so it hath been ruled. The *second* cause, that the lease was not good, because the dean and chapter let it in their chapter-house, by setting their seal to it; which being a perfecting the deed of the corporation, there can be no other delivery: then the first lessee continuing in possession, and they out of possession, the lease was void, and the delivery after by the attorney, it having a former delivery, is void; *sed non allocatur*: for there is no other means for a corporation to make a lease but this. And *Gawdy* said it is plain, that it is not the lease or deed of the corporation until delivery, as of another person. *Thirdly*, The first lease ceaseth not till entry, and so cannot make a new lease. *Wray*, the first lease doth clearly cease without entry. *Gawdy* doubted. *Fourthly*, The lease is not good, for the attorney hath not executed his warrant according to his authority; for it was, that he should enter and claim it to the use of the corporation, and then deliver the lease; and the Jury found, that he delivered it upon the land, but found not that he had entered and claimed, &c. *sed non allocatur*: for in a special verdict, the circumstances of every thing need not so strictly be found,

as stated in a plea, &c. and it being found, that by virtue of the warrant he delivered it upon the land, it shall be intended he pursued it duly. *Fifthly*, It is found that they demanded the rent at the chapter-house, where the demand should be upon the land. *Sed non allocatur*; for the demand at the place where it is payable is sufficient, and the plaintiff had judgment.

5th Objection.

Of the difference between pleading, and special verdicts.

In *ejectment* for land in *Devon*, a special verdict was found to this effect: that *J. P.* being seised of land in fee, by indenture between him and *T.* his son of the one part, and two strangers on the other part, in consideration of the natural love and affection which he had for *T.* his son, &c. gave, granted, and infeofed the two strangers with the said land, to the use of himself for life, remainder to his son *T.* and his heirs males of his body, with remainders over. And covenanted in the said deed with the two strangers, that they should enjoy the aforesaid land to the uses before specified, and this *exonerated, freed, &c.* from other *incumbrances*. And the Jury found that this deed was *sealed and delivered*, but that it was not executed by *livery* nor by *attornment*. *J. P.* died, and afterwards *T.* died. And if his issue was tenant in tail by force of this use, or seised of the antient fee, was the doubt; and it was resolved *per totam Curiam*, that the issue was seised of the antient fee, and that no use was raised by this deed, and so judgment was given for the plaintiff; and in this case it was resolved,

Hore & Dix,
H. 12. Car. 2.
C. P. Entr. T.
1658, Rot. 1824.
1 Sid. 25.

An use shall not be raised by covenant, nor by declaration, where it was intended to be otherwise raised.

2 Vent. 319.

Judgment.

1st.

1st Resol.

1st. That no estate passed to the two strangers, because as the deed indented was never executed by *livery*, &c.; nor any use raised to them, inasmuch as there was not any consideration for raising it; and if it was raised to them, it could never come again to *P.* and *T.* his son, because an use could not be raised upon an use.

4d Resol.

2d. If an use should be raised here, it ought to be by way of transmutation of the possession, and this could not be so here; inasmuch as the deed was not executed as hath been said; and this is manifest from the words of the deed, which are *que done, grant & infeoffe*. Vide for this *Foxe's* case, 8 Co. 94. and Sir Row. *Hayward's*.

3d Resol. Mod.
Rep. 176. Sid.
82.

Win. 60.

1 Cro. 127. pl.
14. 3 Cro. 394.
pl. 19. Winch.
59. Roll's Uses,
788. Winch. 35.
March. 50. Sid.
82. 354. 1 And.
25. Vide case of
Crosse and Sey-
damore. Frem.
368.

3d. The intent of the parties is the foundation of uses, 2 *Inst.* 672. But this intent ought to have three qualifications, it ought to be manifest upon the face of the deed. 2. It ought to be according to the rules of law. 3. This intention ought to be taken upon the entire deed & *res & modus habendi* is to be considered, and the case of *Buckler* and *Simonds*, 21 *Jac.* was cited, where the father granted that his land should remain to his son, and held that this would not raise an use, for although there is *res*, yet there is not *modus habendi*: so is the case of *Pitfield* and *Pierce*, 16 *Car.* in *B. R.* where the father granted his land to the use of his son, but no livery was made, and held that no use arose. These resolutions the Chief Justice said were founded upon the book 21 *H.* 7. 18. If I covenant that my son shall have my land, this is held good by reason of the word *covenant*, 1 Co. *Chudley's* case, and this is cited in *Seimour's* case in *Dyer*, 96. But *Hob.* denied this; and according

according to *Hob.* was the opinion of the Chief Justice at present, because a consideration was wanting. But the Chief Justice said that if I will that my son shall have my land in consideration of marriage, although the word *covenant* is wanting, yet the use is well raised.

Winch. 60, 1.
1 Cro. 427.

7 Co. 40. b.

4th. It was resolved that an use at this day may not be raised without deed, and to prove this *vide Callard* and *Callard's case*, 1 *Rep.* 75. a. 12 *El. Dy.* 296. b. And as to the case of a devise of land to uses by will in writing which is not a deed, it was said that this was upon another reason, *Sc.* rather upon the statute 32 *H.* 8. of wills, than upon the stat. 27 *H.* 8. of uses.

4th Resol.

Poph. 45.
cont. v. Sid. 82.
2 Roll's Uses,
783. Poph. 50.

Mo. 688.
2 And. 164.
3 Cro. 345.

5th. The covenant in this deed cannot raise an use, which is that J. P. covenants with the two strangers, that they shall enjoy the land to the uses aforesaid, *freed* from all *incumbrances*. 1. Because this is made to strangers. 2. Because this is made between the parties only, without mention of their heirs, and so is intended to be personal. 3. Because if the deed had been good, it would enure to another effect, *viz.* to free the land from incumbrances; and they said that this *very matter* was in *Simonds* and *Buckler's case*, mentioned before, and was never disputed.

5th Resol.

Nota, That *Bridgman*, C. J. took a diversity between covenants obligatory, and covenants declaratory, for covenants declaratory serve to limit and direct uses, but covenants obligatory, as in the present case, for enjoying this *freed* from incumbrances shall never be construed to raise an use, inasmuch as they have another effect. In this case exceptions were taken to the special verdict, 1. Because the declaration is of land in *Spreton*, and the verdict

Winch. 60.

Exceptions to
verdict.
Carter, 80.

verdict in *Spriton*, and in the declaration the land is named *Begly*, whereas in the verdict it is called *North-Begley*. 2. Because it is not found that the lands named in the verdict which the deeds concern, are the same lands mentioned in the declaration.

6th Resol.

But it was resolved that the verdict was good, and there is a difference between pleading which is done *per peritos*, and a special verdict, which is the saying of the *Leys gen'*, and therefore, 1. Neither the misprision of a letter, nor the addition of a word, shall hurt in a verdict, so long as *constare potest* that it is the same place and the same land. As to 2, Although they have not found that it is the same land in the declaration mentioned, yet they have found the *entry* and *ejectionment* according to the declaration, and there he declares of land in *S.* that he was ejected from land in *S.* And for authority in this case, *vide* the pleading of Sir *G. Brown's* case, which is in *Coke* 3. where *Anthony* is found the son, but not the heir, yet good, and yet, without being heir the plaintiff had not title. And the like exception was taken by *Barkley, J.* (as in our case) in the case of *Cleeve* and *Vere*, reported, although not at large, 1 *Cro.* 458. *V.* 4 *Co.* 65. 9 *Co.* 51. *Hutt.* 55.

3 Rep. 46.

Sir W. Jones,
285. *Hutt.* 56.

Where the Jury find more than is in issue, and assess damages, &c. if it be error.

Galvert v. Arnold, M. 14 Car.
2. B. R. 1 Sid.
96.
Assault, battery, wounding.
—As to the force not guilty;

Error to reverse a judgment given in *Lancaster*, in an action of *trespass*, where the plaintiff declared for an *assault*, *battery*, and *wounding*; the defendant pleaded, *quo ad* the *force*, *not guilty*, and *quo ad* the *assault* and *battery*, that he

he was removing a market-cross to a more convenient place, and the plaintiff interrupted him, for which reason *molliter manus injecit*, &c. and issue joined. The Jury found the defendant guilty *de injuria sua propria*, and so recited the entire declaration of the *assault*, *battery*, and *wounding* (where the *wounding* was not in issue) and assessed damages *occasione transgressionis illius ad 20l.* and after several debates, it was held by the whole Court, except *Windham*, J. that it should be intended that they had given damages for every thing in the declaration, *scil.* the *wounding*, which was not in issue, and therefore it is error, for the plaintiff might have demurred to the plea.

And it is similar to where the jury find more than the plaintiff declares for, and assess damages for it. *V. Hob. 187. and Co. Entr. 643.*

N. B. Where the jury assess more damages than laid, plaintiff may enter a *remititur* for the *surplus*. If he does not, but takes judgment for the whole, it is error, and cannot afterwards be amended.

In all special Verdicts the Judges will not determine upon any matter of fact, but that which the Jury have declared to be true, by their own finding.

The case found by the special verdict was briefly, that J. S. seised of land in fee, made a jointure on his wife, and afterwards acknowledged a statute, and having issue a daughter within age who was his heir, died. The land

as to the assault and battery, a justification. No notice taken of the wounding—Jury find and assess damages for the whole, tho' the wounding was not in issue—this is error.

Co. Ent. 644.
5 Co. 35. a.
Yelv. 5, 6.

Vide post,
Hinks v. Clerk.

Street v. Ld.
Roberts al. Sir
Wm. Roberts,
T. 1653. Sup.
Banc. 2 Sid. 86.
Extent of land,
upon a statute
acknowledged
after a jointure,
and before issue,
but extent le.

vied after issue,
pending infan-
cy.

Resol.

Extent void
as to the feme.

Lands cannot
be extended
whilst in the
hands of an in-
fant.

Reversion not
extendable.

Jury must in
special verdicts
find the facts to
be true.

Vide the next
case.

land was extended upon the possession of the
feme.

Resolved, 1st. The extent is void as to the
feme, and cannot prejudice her title, which is
paramount the statute, and it was said that if
the *feme* die, yet the lands may not be ex-
tended whilst they are in the hands of an in-
fant.

2dly, A reversion may not be extended.

3. In all special verdicts the judges will not
determine upon any matter of fact but that
which the jury have declared to be true by
their own finding. And for this reason the
judges will not determine upon an inquisition
or *aliquid tale* formed at large in a special
verdict, for their finding of this is not an af-
firmation that all that is in it is true.

*Where the Jury find the issue, and more, it is
good for the issue, and void for the residue.*

Hinks v. Clerk,
E. 31 Car. 2.
B. R. Ent. H.
ult. Rot. 945.
2 Lev. 252.

A stranger
puts his cattle in
the common,
and the com-
moner distrains
them.

Error upon a judgment in *replevin* in *Dur-*
ham, where the defendant avowed that *Sunder-*
land is an ancient borough, consisting of twelve
capital burgesses called *Freemen*, and of twelve
inferior burgesses called *Stallingers*, and that
there is a custom there, that each *freeman*, in-
habiting any messuage there, hath common in
the place in which, &c. for certain cattle, to
wit, for two horses, and four cows; and that
each *stallinger* inhabiting any messuage there,
had common for one cow; and because the
plaintiff being a stranger, put his cattle there
to the prejudice of his common, the defendant
avows the taking. The plaintiff traverses the
custom. The Jury find, that the capital bur-
gesses, *ss.* the *freemen* have had common for two
horses, or four cows; and that the *stallingers*

§

have

have had common for one cow. But farther they find, that the *wife* of each *freeman* or *stallinger* inhabitant, hath the same common after the death of her husband. And that the copyholders, burgessees, and stallingers have common also for *vaches, vitulis, bobus, spadonibus, iuvencis, et omnibus ad quantitatem et loco et vice, Anglice* their stints, *ut present' limitat', et si super tota materia, &c.* for the plaintiff, if not, for the defendant; and upon this verdict, judgment was given for the *avowant*. And upon this two errors were assigned, 1. That the common is other and variant from that which is pleaded, *sc.* for *sheep, calves, heifers, &c.* 2. The custom for inhabitants to have common is bad, and exactly the same with *Gateward's* case, 6 Co. To which it was answered and resolved, 1. The Jury had found the custom expressly as to the first, and all that they had found over is void, as the case in *Dyer*, in *assumpsit* the jury found that the defendant undertook *modo et forma si J. S.* said true, this is good, and the *et si, &c.* is surplusage and void, and 3 Cro. 405. *Gray v. Fletcher, et ibid* 546. *Lovelace v. Reynolds* are in point. 2. The custom here is not for inhabitants, but for *freemen* and *stallingers* who are members of the corporation inhabiting, and the inhabiting in this case is merely *restrictive, scil.* that they shall not have common, *unless* they inhabit. 3. The custom laid for each member is good, as well as where it is laid in the corporation, to have for them, and each member, as it was in the case of *Derby* in *Stable* and *Miller's* case. And of such opinion was the Court, and affirmed the judgment. *Holt, junior*, for the plaintiff; *Levinz* for the defendant in error. *Vide ante.*

Each member may prescribe in right of the corporation.

A new trial granted after a special verdict signed by counsel on both sides.

Namink v.
Farwell, M.
1719. Bunbury,
51.

Action for
a seisure with
out probable
cause.

Upon an action brought against an officer for a seisure *absque probabili causa*, there was a special verdict signed by the counsel on both sides; but the Attorney-General, notwithstanding, moved for a new trial, and obtained it: although it was said by the counsel on the other side, that there never was any instance that a new trial was granted after a special verdict which is signed by counsel.

The opinion of the Court as to finding or not finding of robbery.

The King v.
Francis, & al'.
8 G. 2. Annaly.
113. 2 Stra. 1015.
Com. Rep 478.
pl. 210. See
Fost. Cr. Law,
128.

Uncertainty
of finding, as to
robbery.

The finding.

Lord *Hardwicke*.—Many objections were made to shew that this special verdict is not a charge of robbery; but they have been all over-ruled but one, which was singly to the uncertainty of the finding, *viz.* That it does not certainly appear from these words in the special verdict, "That *Coxe* offering to take the money up again, the six persons then and there being present, threatened him if he took it up to knock out his brains, whereby *Coxe* then and there was put in fear, and then and there desisted, and the six persons then and there immediately took it up, and got on horseback and rode off with it; that the money was taken up in *Coxe's* presence," so that the Court adjudged it to be a taking from the person: upon this point it has been argued before all the Judges, and my brothers *Carter*, *Comyns*, and *Thompson* doubt, but all the rest are of opinion that

this is not a sufficient finding to make it robbery.

Robbery is a felonious taking from the *person*, putting him in fear, 3 *Inst.* 68. and therefore all the indictments lay a taking *a personâ*, but then the law construes a taking in a man's presence to be taking from the person; so *Stamford* 27. *a.* and when the taking shall be said to commence is matter of evidence to the jury.

Therefore I would premise that we had no doubt as to the definition of robbery, or of what would be evidence thereof to a jury; but all our doubt was as to the uncertainty of this special verdict.

The striking of the hand here found, does of itself exclude all force, for it is that he gently struck, and yet if that had been found to have been done *animo furandi*, it would have made the case plain, but for aught appears now, it might be but a simple assault, or an accidental blow, and without intention to make the money fall.

It is found that *Coxe* was put in fear, and then and there desisted to take up the money; but it does not appear how he desisted, and it might be by going away, &c.

The jurors also find that the six persons then and there immediately took up the money, and got on horseback and rode off, and upon these words our great doubt was; now there is no colour to say that the words *then* and *there* can aid any uncertainty therein, for they only relate to the *venue*, and cannot tie up the fact; so then the only material word remaining, is the word *immediately*, and nine of the Judges agree that this is of so uncertain a

As to the signification of the word immediately.

signification, that it cannot warrant the Court upon this finding to say that the taking was in *Coxe's* presence.

It was said that that word excludes all intermediate time and actions, but it will appear that it has not necessarily so strict a signification: *Stevens* in his *Thesaurus* expounds the word *immediate*, by *cito et celeriter*; so *Cooper's Dictionary* renders in *English* immediately, forthwith, by and by; and *Minsheu* gives it as various meanings, and refers it to the word presently: nor is its signification more confined in legal proceedings, as appears even from 2 *Lev.* 77. in the case of *Pibus* and *Mitford*, which was cited to the contrary, which say thus, though the word immediately, in strictness, excludes all *mesne* time, yet to make good the deeds and intents of parties it shall be construed such convenient time as is reasonably requisite for doing the thing: this word has also been frequently used in special verdicts of murder, as in *Onesby's* case, *Trin.* 13 *Geo.* 1. 2 *Stra.* 766. 2 *R. Raym.* 1485. *Bar-nard. B. R.* 17. it is used four or five times with different applications; and in the special verdict in *Mawbridge's* case, *Kel.* 120. it is twice used in different senses and explained so by other words, as in one place it is said immediately thereupon without intermission drew his sword; and in another place, immediately, in a little space of time between *Mawbridge's* drawing his sword, and the giving the mortal wound, &c. Also the *stat.* of 27 *Eliz.* c. 13. §. 11. enacts that no person robbed shall have an action against the hundred, except he shall, with as much convenient speed as may be, give notice of the robbery to some of the inhabitants

habitants of some town near the place ; and in all declarations on that statute, the averment of such notice is thus, *quod immediate post feloniam* the plaintiff gave notice, &c. and so are all the precedents in *Coke's Entries*, tit. *Hue and Cry* throughout, which shews that the word *immediate* there means only with convenient speed, and convenient speed used has accordingly been always allowed to be evidence of that averment, and likewise writs of *habeas corpus* returnable *immediate*, mean only with as much convenient speed as may be.

And if the meaning of this word is thus unsettled, the Court cannot say it absolutely excludes all *mesne* acts: the circumstances here found were certainly probable evidence to the Jury to have found that the taking was in *Coxe's* presence ; but if the Jury have not found that as a fact, we can make no intendment, but as my Lord *Holt* says, in the case of the *King* and *Plummer*, *Keyling* 111. as the Jury have not found that matter, we are confined to what they have found positively, and are not to judge the law upon evidence of a fact, but upon the fact as it is found. And my Lord *Raymond* said to the same purpose in the case of the *King* and *Huggins* *, that it would be of most dangerous consequence to leave inferences to be made in case of life by the Judges, where the fact was not found.

Therefore the prisoners must be acquitted of this indictment.

But we are all of opinion that the prisoners must not be discharged out of custody, because here is plain charge of grand larceny upon them by this verdict ; but however we cannot give judgment of grand larceny against the prisoners upon this indictment ; for though on

2 R. Raym.
1581. 2 Stra.
886. Fitzgib.
187. Barnard.
B. R. 397.
* Vide ante,
IX. (19.)

indictment for burglary and felony, the jury may acquit the party of burglary and convict him of felony; or if a person is indicted of felony so circumstanced as to exclude him from the benefit of clergy, the jury may acquit of felony to such a value as would forfeit that benefit, and only find him guilty of felony within benefit of the clergy, and judgment may be given accordingly thereupon; yet here the indictment is for robbery *a persona*, and the only doubt referred to the Court by the Jury is, whether he is guilty of *that* felony and robbery, upon the facts stated by them; but as I say here is a plain charge of grand larceny upon this verdict, the prisoners cannot be discharged, but must be remanded, and then they may be removed by *habeas corpus* to be tried for this grand larceny; and this differs from the case of the *King* and *Burridge*, 3 *Wil. Rep.* 439. 2 *Ses. Cas.* 264. pl. 173. last term, because here is a felony appears plainly upon the verdict, but there no felony appeared.

Where an executor shall cover assets by pleading the penalty of a bond to be due, and where he shall only cover assets to the amount of the sum in the conditions: the method of pleading these bonds.

The Bank of
England v. Catharine Morrice
widow, executrix of Hum-
phrey Morrice,
deceased, H. 9
G. 2. Annaly.
219. 2 Stra.
1028. 2 Barnard.
B.R. 183. 2 Kel.

Plaintiffs declare upon several *indeb. assumpsits*, of several sums lent, and had and received to the plaintiff's use, by the testator, to the amount of £. 31,432. 10s. and then there is a count in the declaration (upon which the verdict was found) for £. 32,000. had and received to the use of the plaintiffs *ad dampnū* of the

the

the plaintiffs £. 35,000. Defendant pleads a judgment recovered, and several bonds and articles with penalties unsatisfied, and particularly a bond entered into by testator to Sir *William Morrice*, Bart. dated 6th of *March* 1727, in the penalty of £. 53,000. conditioned for payment of £. 26,000. in manner therein mentioned, viz.

165. pl. 139.
Tri. at Ni. Pri.
131. See Andr.
110.

£. 5000. and interest for the whole on the 24th of *June* 1728.

£. 5000. and interest for £. 16,500. on the 24th of *June* 1729.

£. 5000. and interest for £. 11,500. on the 24th of *June* 1730.

£. 5000. and interest for £. 6,500. on the 24th of *June* 1731.

£. 5000. and interest for £. 1,500. on the 24th of *June* 1732.

And £. 1,500. and interest on the 24th of *June* 1733.

And if default should be made in payment of any or either of the said sums, or any part thereof at the times therein limited, that then the said bond should be in full force; and she avers that the two last payments of £. 5,000. and of £. 1,500. and interest have not been made, and that the bond remains in full effect, and not cancelled or satisfied; and another bond entered into by the testator to *Thomas Wilson*, dated 27th of *July*, in the 4 G. 2. in the penalty of £. 5,000. conditioned for payment of £. 2,500. upon the 27th of *July* 1731, which she avers is still unpaid. And another bond entered into by the testator to *Duncan Campbell*, dated 25th of *March*, 4 G. 2. in the penalty of £. 3,000. conditioned for payment of £. 1,500. on the 1st of *May* then next, which she likewise avers is still unpaid;

and she pleads *plene administravit* in this manner, "*Et eadem Catharina ulterius dicit, quod ipsa plene administravit omnia bona et catall' quæ fuer' præfat' Humfredi tempore mortis suæ in manibus ipsius Catharinæ administrand' præterquam bona & catall' ad valenc' mille libr' quodq; eadem Catharina non habet nec die exhibition' billæ præd' ipsor' gubernat' et societat', nec unquam postea habuit aliqua bona seu catall' quæ fuer' præfat' Humfredi tempore mortis suæ in manibus ipsius Catharinæ administrand' præterquam bona & catall' præd' ad valenc' præd' mille libr' quæ solution' & satisfaction' separal' denar' præd' per separal' script' obligator' articulos & judic' præd' debit' & solubil' onerat & obligat' existunt. Et hoc parat' est verificare unde pet' judic' si præd' gubernat' & societas action' suam præd' inde versus eam habere seu manutenere debeant, &c.*" Plaintiff's reply, "*Quod præd' Catharina die exhibition' billæ præd' ipsor' gubernat' & societat' habuit divers' bona & catall' quæ fuer' præd' Humfredi tempore mortis suæ in manibus suis administrand' ultra bona & catall' sufficien' ad satisfaciend' separal' denar' præd' per separal' script' obligator' articul' & judic' præd' debit' & solubil' unde præd' Catharina dampn' sua præd' eisdem gubernat' & societat' satisfecisse potuit, viz. apud London' præd' in paroch' & warda præd.*" And issue is joined thereupon; and at the trial the plaintiffs allowed the defendant to cover assets for the penalties of all the bonds and articles except those particularly mentioned above, and on which only the plaintiffs made objection; and the Jury found a special verdict to this effect.

That the testator was at his death indebted to the plaintiffs in £. 28,993. 8 s. 1 d. for money had and received to their use,

That

That the money due on Sir *William Morrice's* bond, *Wilson* and *Campbell's* bonds, for the sums in the conditions and for interest together with the penalties of all the other specialties and judgments pleaded, amounts to £. 22,182. 10 s.

That at the time of exhibiting the plaintiff's bill, the defendant had assets in her hands to the value of £. 41,152. 2 s. 5 d.

That there was justly due and owing on Sir *William Morrice's* bonds at the testator's death, for the sum in the condition and interest £. 6,830. for principal and interest on *Wilson's* bond £. 2,520. and for principal and interest on *Campbell's* bond £. 1,540.

That at the time of exhibiting the bill, the defendant had not assets to discharge the penalties of said three bonds.

That deducting the above £. 22,182. 10 s. out of the assets found as above, there remains in her hands at the time of exhibiting the bill £. 18,969. 12 s. 5 d. liable to the demand of the plaintiffs, if the penalties of the said three bonds ought not in this case to be allowed as charges upon the assets.

But whether they ought to be so or not, the Jury pray advice of the Court; and if they are not, they find for the plaintiffs' damages £. 28,993. 8 s. 1 d. costs 40 s. assets to the value of £. 18,969. 12 s. 5 d.

If otherwise they find for the defendant.

They find every thing else necessary to bring the merits in question.

N. B. The declaration was of *Hilary* term 1731.

This verdict was several times argued at bar, in *Easter* term last, by *Strange* for plaintiffs, and *Bootle* for defendant; in *Trinity* term by
Serjeant

Serjeant *Eyre* for plaintiffs, and Serjeant *Chapple* for defendant; and in *Michaelmas* by *Marsh* for plaintiffs, and *Dennison* for defendant.

Strange argued, That the defendant upon this plea and replication can cover no more assets on the three bonds than for the sums due upon the conditions; that she ought to have pleaded these bonds as single bonds, without setting forth the condition, and that is the method which chiefly occurs in the reports, and then plaintiffs must have over-reached the penalties, because the Court could not have gone out of the record to consider them as penalties only; but as that method used to drive the creditor into a court of equity to discover what the real debt was, therefore the courts of law encouraged another method of pleading, either for the defendant to set forth the condition in the plea, as the defendant here has done, or else for the plaintiff to reply the penalties or judgments were kept on foot *per fraudem*, and upon such an issue they allowed slight evidence to shew a fraud, so that if one judgment was falsified, all the judgments were taken to be falsified likewise, *Carthew*, 196, 431. That the courts recommended this way of pleading, he cites 1 *Vent.* 354. and *Salk.* 312: *Parker* and *Atfield*. That though in the plea she does not say no more is due than the sums in the conditions, yet it must be taken to be so, because *ambiguum placitum accipiendum est contra proferentem.* *Co. Lit.* 303. *b.* that the replication here is good, because in all replications, except *nul award fait*, it is sufficient to meet the plea and falsify the excuses made therein, and that replication of *nul award* depends on a particular reason; *Salk.* 138. *Meredith* and *Allen*;

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len; now this replication has done so. That the penalty is not to be absolutely taken as the debt, he cites *Tully* and *Sparkes*, 2 *Stra.* 868. *Pasch.* 3 *G.* 2. where the question was, what was the meaning of the word debts in the bankruptcy act, and the Court held it meant a demandable and justly due debt.

Bootle argued, that this case must be taken according to the strict rules of law, and as it stands upon the pleadings as they are, and not as they might have been pleaded. Now the issue stands thus, she pleads that she has fully administered, except *quæ ad satisfaciend' denar' præd per script' obl', &c. solubil' onerat' existunt*: and the replication is, that she *habuit ultra bona sufficient' ad satisfaciend' denar' præd per script' obl', &c.* So that the issue is, whether she had assets *ultra* the sums in the bonds, &c. and that cannot be referred by the rules of law to any sums but the penalty, for every bond is a debt immediately. *Stevens* and *Lofting*, *Michaelmas* 7 *Geo.* 2. and the expediency of pleading will not alter the law. That the penalties are pleadable whether the conditions be due or not. 1 *Roll. Abr.* 925. *Lit.* 2. pl. 2. § 4. and 3 *Lev.* 368. *Thompson* and *Hunt*. The plea says that the bond is not satisfied, which, as the replication does not deny, consequently confesses according to all the rules of pleading.

He cites 3 *Lev.* 368. likewise to shew that the penalty is a protection for so much of the assets, unless it appears to be kept on foot *per fraudem*. That the case of *Vent.* 354. there is this difference from the present case, *viz.* that there the executor pleaded the testator indebted to himself, and therefore he was bound to take only what was justly due, but where
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the debt is to a stranger he may always claim the whole, and there is only relief in equity. He cites *Cro. Cha.* 362. *Goldsmith* and *Sydnor*, that a bond for payment of money is pleadable as a debt *in presenti* even before the day of payment, though it be otherwise of a bond for performance of covenants.

Lord *Hardwicke*.—I do not think the question now is, whether in strictness the penalty is the debt, but what must be adjudged to be the debt upon the pleadings, as they are in this case. The issue is, whether she has assets *ultra* what will satisfy the sums aforesaid payable by the bonds, &c. so that the question is, whether the penalties of the bonds, or the sums in the condition, are meant by the words sums aforesaid. The modern way of pleading is for the defendant in the plea to set out the bonds with the conditions; but sure that seems to be an argument against the defendant in the present case; for the reason of introducing that method was, that the truth might appear. I think it would be most unnatural, when she herself has pleaded that so much is due, for us to lay any weight on her not having said, and no more, unless it appears from the whole, that we are to take the penalty to be the debt; and if we are to take that to be the debt in this case, there is no use in pleading fairly, and she might as well have pleaded as they used to do, and then the plaintiff must have craved *oyer* and replied *per fraudem*; therefore the question is, whether this replication should have shewn that the obligees were willing to take the sums in the condition; but no case has been shewn where the plea sets out the condition, that it should say that and no more is due; or that the plaintiff should reply specially,

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and I should be glad to see a case of that sort; as to *Page* and *Denton*, 1 *Vent.* 354. as *Bootle* observes, it is not an authority in this case, for there it was a plea of retainer, and when the executor had as much in his hands as was sufficient for the just debt, it was considered as a payment of the bond, but still it shews that in these kinds of pleading the Court is not in all cases bound to take the penalty to be the debt in law. It is pretty strong for the court, when the defendant has claimed what is to satisfy so much as due, to presume that more is due. And it is considerable that since the case of *Thompson* and *Hunt*, in *Lev.* the Court, by a general law, viz. the statute for amendment of the law, is bound to take notice that the sum in the condition may be the debt; as to the want of an averment in the replication, that the obligees were willing to accept a less sum, do but consider what is the evidence required of such willingness, only to shew that it is a bond with a condition for a less sum.

Serjeant *Eyre* in his argument cites no new cases.

Serjeant *Chapple*.—That the penalty is the legal debt, for a release of actions discharges the penalty, though made before the condition due. *Co. Lit.* 291. 8 *Rep.* 153. a. 1 *Brownlow*, 62. That the sums in the condition are deemed parcel of the penalty, 1 *Roll. Rep.* 405. *Robinson* and *Francis*. That there is difference between obligation with a condition annexed, and obligation with a defeazance made afterwards, *Cro. Eliz.* 755. 1 *Inst.* 207. That if several penalties are pleaded, and assets only enough for one, the plaintiff must in his replication aver assets more than sufficient to satisfy all, 1 *Roll. Abr.* 922. pl. 5. That the

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use of the defendant's fair pleading in this case is, that plaintiffs in fact take judgment of assets *in futuro*; that the covin is the matter in issue on replication *per fraudem*, *Turner's case* and *Co.* 132. and *Sir William Jones*, 91. where see the manner of such pleading *per fraudem*; he cites for the same 1 *Lutw.* 445. *Bell and Bolton*.

Serjeant *Eyre* in reply cites 3 *Lev.* 57. *Lenum v. Fooke*, replication would be good if avers assets *ultra* the money in the condition.

He cites *Carthew*, 208. *Page and Watts*, that the concluding the plea with a general *plene administravit* will waive the specialties pleaded before; therefore in this case, if the words *sums due and payable*, relate not to the sums mentioned in the condition, the bond to *Sir William Morrice* is waived, since the penalty is not due 'till a breach of the condition, and there was no breach of that condition at the time of the plea.

Lord *Hardwicke*.—This is a new point which my brother *Eyre* has started, and as to that of *Sir William Morrice* keeping it up *per fraudem*, how could the plaintiffs prove that?

Marsh cites *Cro. Cha.* 490, that an executor may release a bond upon receipt of the sum in the condition, and it shall not be a *de-vastavit* in him.

Dennison cited further *Cro. Jac.* 8. 35. 382. and 3 *Lev.* 311. *Knighton and Moreton*.

And now this term, without any further argument, the opinion of the Court was delivered by Lord *Hardwicke*, as follows:

Upon this special verdict two points have been made; First, Whether upon the pleadings in this record, and the matter found by the

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the verdict, the penalties of the bonds whereof the days of payment are past, or only the sums mentioned in the conditions, ought in a court of common law, to be considered as liens on the assets. Secondly, If in these respects there be any difference between those bonds whereof the days of payment are past, and the bond to Sir *William Morrice*, the days of two payments not being come at the time of the plea; and then another question will remain, what judgment must be given upon the matter as here found. As to the first point, nothing is more certain than that if there be a bond with a penalty, that when the day appointed for payment by the condition is past, that the penalty is the debt at law, and relief can be only had in a court of equity; and therefore the defendant might have pleaded so as to have had the full penalties allowed her as charged upon the assets; but she having in her plea set forth the real sums due, and having, by special averment, tied herself up to them, it has been insisted on by plaintiff's counsel, that no more ought to be allowed her to cover assets than those less sums, which she has shewn were payable by the conditions; but we are all of opinion, * that is my brothers *Page* and *Probyn*, and myself, that the penalties of those bonds whereof the days of payment are past, ought to be considered as the debts due at law, so as to cover assets: the ancient method was only to plead the penalty, and to leave it to the plaintiff to shew that the obligee was willing to accept the debt due in conscience, and that the penalty was only kept on foot *per fraudem*; and this was so constantly the method, that there is not any precedent either in the ancient or modern books of entries, of a plea of *plene administravit*,

* Mr. Justice Lee gave no opinion, he being a relation of the defendant.

administravit, where the sums of the conditions of the bonds pleaded are set out; and when this method was first departed from I do not find, but I believe it was when the Judges began to complain of the difficulties plaintiffs were put to by such a disclosing of only part of the case; the first instance whereof is in the case of *Page and Denton*, 1 *Vent.* 354. where the court said, that if men would plead their case specially, it would save many a suit in Chancery; the other is in the case of *Parker and Atfield*, 1 *Salk.* 312. where the court said that the best way for an administrator to plead, is to plead truly and honestly; and though there is a judgment for a penalty, he ought to plead the judgment, and shew how much is due; from which sayings it was inferred by the plaintiff's counsel in this case, that when the defendant shews what is due, no more assets shall be covered than to the amount of what is so shewn, or else, said they, what is the use of this new way of pleading? But as no authority can be found to prove that the penalty is not to be taken to be the debt, this *obiter* saying in the books shall not settle it; and yet notwithstanding this manner of pleading will remain to be of great use. Upon the old method nothing appears in the plea but the penalty, and the plaintiff is not thereby enabled to tell whether it be a single bond, or with a condition, and the defendant is not bound to make a *profert* of the bond pleaded, not being supposed to have the same in his custody, much less is the obligee in such bond bound to produce it; and if there were any collusion between the obligee and the executor who pleads such bond, the plaintiff might perhaps be never able to come at the truth of the

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fact, in order to make a proper replication, which would oblige him to resort to a court of equity to discover and make a proper case at law, whereas by setting out the condition in the plea all these delays are avoided, for the plaintiff sees what is the real debt, and may, upon enquiry, know whether the penalty is kept on foot *per fraudem*; and this is sufficient to satisfy the saying of the court in the case of *Page and Denton*, that such pleading will save many suits in Chancery; for so it will, and will enable the plaintiff to have the equity of his case even in a court of common law, but to require more might be perilous to an honest executor, for the penalty is to secure interest, costs, and charges to the obligee as well as the sum mentioned in the condition; and the executor of the obligor is likewise intitled to this out of the assets, and therefore it is impossible to settle and adjust that at law, without confounding law and equity; and disputes may happen between the obligee and the executor, which may oblige the executor to apply to a court of equity, of which he must pay costs, as if he should apply to equity to oblige the obligee to take only his real debt; or if he would take the benefit of the statute for amendment of the law, and pay the money really due into court, he cannot do that till an action is brought against him, and then too he must pay costs; and therefore if the matter were to be taken thus strictly upon the plea, the executor might be left to pay such interest and costs out of his own pocket, though it would be no inconvenience to oblige the obligee, if he were plaintiff to take his real debt; therefore it is better it should be open to equity in such cases, than for us to blend

the rules of law and equity together. This is the sense in which that general expression which has been so much relied on for plaintiffs should be taken. There were cited for plaintiffs *Cro. Cha.* 490. *Knyveston* and *Latham*, but the case is really an authority against them, for it was held that the penalty of the bond is the debt at law, and relief could be had only in a court of equity; and that was confirmed, as the book says, by the judges at the table in Serjeant's-Inn; though it was held by two judges, that a release by an executor of full age, having received the principal and interest which was due in equity, should be only assets for the interest and money received, and not be a *devastavit* for the residue; and it was for this latter opinion only that the case was cited; but there is a great deal of difference between charging an executor with a *devastavit* for not receiving a penalty which a court of equity would not suffer him to receive, and letting him have the advantage of a penalty to cover assets, as in this case. The case of *Page v. Denton*, 1 *Vent.* 354. was likewise cited for the plaintiff; and at first sight it seemed a strong case for him, but upon considering it, it is otherwise, for it is a plea of a retainer by an executor himself, and not of payment to a third person; so that it would have been absurd to require a replication that the obligee was willing to accept a less sum, or that the executor kept the bond on foot *per fraudem*; and this was the true ground of that case; and the court took care to distinguish that case from the case of a forfeited bond standing out to a stranger, so that case is like the case of *Thompson and Hunt*; that case was a plea by an executor of judgments obtained against him upon

upon several bonds made by the testator, and replication that the obligations were with conditions to pay less sums, and that the defendant had assets to pay the plaintiff *ultra* what would satisfy the debts and judgment in his plea, and on demurrer to the replication it was held good, because the penalties are the legal and due debts, and the plaintiff might have aided himself by pleading that the bonds were kept on foot by fraud and covin, and upon issue of the fraud, the plaintiff might give in evidence such matter as would serve him to avoid the penalties, and so judgment was given for defendant: and that case of *Thompson and Hunt* is affirmed to be law in *Bell and Bolton*, 1 *Lutw.* 450. to distinguish that case from this it was said, that the several less sums were set out in the replication in that case, but that here they are shewn by the defendant herself in the plea, and that therefore it must be understood in this case that she herself insists on more being due; but that makes no difference, for when in *Thompson and Hunt* the defendant averred in his rejoinder, that he had not *ultra* to satisfy the penalties, it was an admission of the replication, and the same as if the defendant had himself set out the less sums; another difference was made from the different manner of pleading in this case, because the defendant in pleading the several bonds has added that the sums in the conditions remain still due and unpaid, and then concludes her plea, that she has not assets *ultra* what will satisfy the several sums by the bonds, articles, and judgments due and payable, and therefore they would have it that the sums said in the conclusion to be due and payable on the bonds, mean the sums before

to be due thereon, *viz.* the less sums; but in answer to that, the words in the conclusion of the plea are not the same as in the several averments; in the averments the words are, *due*, and in the conclusion the words are, *due and payable*, which in law is the penalty; but there is a more substantial answer to be given to that, for the defendant has averred that the penal sums of the articles remain due and unpaid as well as the sums of the bonds; and as to the articles at least the words must of necessity mean the penalties, and it would make strange confusion in the same plea to construe the same words to refer sometimes to penalties and sometimes to the less sums, sometimes to the debts at law, and sometimes to the debts in equity; therefore, if those words are to be applied to the penalties in the articles, they ought likewise to be applied to the penalties of the bonds; it was likewise objected that there is no precedent of a replication *per fraudem*, where the defendant's plea sets forth the particular sums due by the condition, but the answer that has been given to that is sufficient, that neither is there any precedent of such a plea.

As to the second point, we are of opinion that the defendant can be allowed no more upon Sir *William Morrice's* bond than is due in equity and conscience, for it appears that the days of payment of the two last instalments were not come, and we conceive that upon this plea all the prior instalments must be taken to be satisfied; then the question will be, if a bond be pleaded with a penalty conditioned to pay a less sum at a day to come after the plea, whether it shall be allowed to cover assets to the amount of the penalty; it must be allowed

lowed that such a bond is pleadable; so is *Cro. Cha.* 363. and *1 Rol. Abr.* 925. *pl.* 2. but then it will cover assets no further than the amount of the sum payable in conscience, for the bond not being payable, nothing is due at the time of the plea, and it would be absurd to let the executor cover assets for a debt which cannot be recovered against him; and this is proved by the way of pleading in such cases; so in *Cro. Eliz.* 315. the defendant avers that he has no assets *ultra* the money due by the condition, and not *ultra* the penalty; so *3 Lev.* 57. *Leman* and *Fooke*, judgment given for the defendant, because plaintiff in his replication did not say that the defendant had assets *ultra* what would pay the money in the condition, which directly admits that if the replication had averred assets in the defendant's hands *ultra* to pay the less sum, it would have been good. If we consider too how this differs from a forfeited bond in the reason of the thing: this bond the executor may pay, by paying the less sum when the day comes, for she has admitted assets in this case by pleading it; so is *1 Salk.* 198. and 312. and if she has assets it is her duty to pay it; and if she does not, but lets the interest run upon it, having assets, that will be a *devastavit*; so is *1 Vent.* 198. *2 Lev.* 39. it differs also from a forfeited bond in this, that the plaintiff could not reply *per fraudem*, for it was no fraud in her not to pay a bond which was not due.

But the greatest difficulty is, what judgment must be given in this case, for upon this verdict there are two objections; 1st, That the assets found liable to satisfy the plaintiff, are found in one intire sum, supposing all the penalties are not to be allowed as charges upon

the assets, and no distinction is made in the verdict as to the penalties of the bonds, and the assets to be liable, if some are allowed and others not; but as the Court is now of opinion that some of the penalties ought to be allowed and not others, that will reduce those assets in defendant's hands, which are really liable to the plaintiff's demand. The other objection is, that the interest included in the sums found to be really due upon the bonds, is only carried on to the testator's death; and yet it appears that the executor must pay interest on Sir *William's* bond, to the time of payment of the two last instalments, for which reasons the Court cannot give judgment for the intire sum found by the Jury; but then the question is, whether we can sever the sum found by the Jury, or whether the verdict can be amended, or whether there must be a *venire facias de novo* awarded.

How special verdicts shall be construed; may be rectified in point of computation.

To which purpose the Court set a further day in this term for hearing counsel upon the said points, and then *Strange* for plaintiff argued, " That the Court may give judgment as the verdict now stands, and for that purpose may compute what allowance is to be made to the defendant, and so give judgment for the plaintiff for such sum as he appears to be lawfully intitled to upon this record; and he cited *Hob. 54. Foster and Jackson*, that howsoever the verdict may seem to stray, yet if a verdict may be concluded out of it to the point in issue, the court shall work it into form and make it serve; and for the same purpose he cited 1 *Sid. 5, 27.* and *Carter, 80.* that the court will set verdicts right, which give greater damages than are declared for; and cites a precedent of that sort in *Thompson's Entries,*

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Entries, fo. 458. he cited also the *King and Hayes, Hil.* 1 *G.* 1. 2 *Stra.* 843. 2 *R. Raym.* 1518. *Barnard. B. R.* 31. he was indicted for three facts; 1st, For forging a bond; 2^{dly}, For publishing such bond; 3^{dly}, For publishing a bond generally, knowing it to be forged; a special verdict was given that he forged a bond in the words and figures following; that he published the same bond knowing it to be forged; and said nothing as to the third fact. And it was objected, that as the verdict neither found the defendant guilty or not guilty as to that, that no judgment could be given; but the court held that upon the facts stated to them, they must adjudge the defendant guilty as to the two first, and not guilty as to the last, and that they were to do what the jury ought to have done; he likewise cited a precedent from *Townsend's first book of judgments*, 165. which he would have to be a precedent for this."

Serjeant *Chapple*, for defendant, argued, "That no judgment can be given upon this verdict, for there will be no *quantum* of assets plainly appearing wherewith to charge the defendant; and he cited 2 *Roll. Abr.* 693. *Lit. f.*—*Cro. Cha.* 549. *Crispe and Pratt, Bro. Exe.* 141. 1 *Roll. Rep.* 234.

LORD HARDWICKE. — The rules which have been laid down as to special verdicts must be allowed; on the one hand that the facts found can only warrant the judgment; on the other, that when the matter sufficiently appears upon the whole, the Court may so mould and form it as to give a proper judgment resulting from the whole taken together, and to this purpose the words in

Hob. are very right: the only question here then is, whether sufficient facts are found to give judgment upon; and as to the doubt which the Jury make, the Court is not strictly tied to that, nor by the conclusion they make, but are, if necessary, to distribute the facts found, and to give a proper judgment upon the whole taken together, even though it were to contradict the conclusion, 2 *Roll. Abr.* 706. *pl.* 33. which is cited and allowed to be law in *Hard.* 347. and I am of opinion that it does sufficiently appear upon this verdict what allowance ought to be made the defendant, and that without any intendment; for as the Jury have found the penalties and conditions, the rest is but matter of computation, and they have found the interest to be at the rate of £.5 *per cent.* and the *terminus a quo* to be from the death of the testator, which facts being found, all that remains is computation, which the Court has always had power to make or alter; therefore I think there is sufficient found for us to give judgment upon; but the question is, in what manner it should be entered; and as to that I think the precedents that have been shewn are stronger than the present case, for if damages which are intire may be severed, *a fortiori* asssets may. There is a precedent in *Townsend's second book of Judgments*, *fo.* 151. which might be made agreeable to this case, and that book was printed by the authority of *Ld. Ch. J. Vaughan*, and is of better authority than *Thompson's Entries*. There are likewise in the same book, *p.* 117. a judgment in ejectment with a *remittitur*, and *p.* 189. another of the same in *quare impedit*; therefore

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fore I think judgment ought to be specially entered for the plaintiff.

Page and Probyn accord: but as it was to be a special entry, a rule was, that the parties should attend a judge to settle the entry.

The entry of the judgment was thus:—
 “ Whereupon all and singular the premises
 “ being seen and fully understood by the
 “ Court here, inasmuch as it appears to the
 “ said Court here, that the penal sums in the
 “ aforesaid two bonds to the said *Thomas Wil-*
 “ *son* and *Duncan Campbell* ought in this case
 “ to be allowed as charges upon the assets of
 “ the said *Humphry Morrice*, and that the pe-
 “ nal sum in the said bond to the said Sir
 “ *William Morrice* ought not in this case to
 “ be allowed as a charge upon the assets of the
 “ said *Humphry Morrice*, but that only the
 “ principal sum of £. 5,000. payable on the
 “ said 24th day of *June*, in the said year of
 “ our Lord 1732, and the further sum of
 “ £. 1,500. payable on the said 24th day of
 “ *June* in the said year of our Lord 1732, to
 “ the said Sir *William Morrice*, with all interest
 “ for the said two last-mentioned sums from
 “ the said 24th day of *June* in the said year of
 “ our Lord 1731, to the respective days of
 “ payment thereof, ought in this case to be
 “ allowed as charges upon the assets of the
 “ said *Humphry Morrice*; therefore by the
 “ assent of the said governor and company of
 “ the bank of *England*, the sum of £. 4,310.
 “ being deducted out of the said sum of
 “ £. 18,969. 12s. 9d. by the Jury aforesaid
 “ in form aforesaid found, whereby the assets
 “ in the hands of the said *Catharine Morrice*
 “ on the day of exhibiting the plaintiff’s bill
 “ liable

" liable to the demands of the said plaintiffs,
 " are only the sum of £.14,659. 12s. 9d. it
 " is considered by the Court, that the afore-
 " said governor and company do recover
 " against the said *Catharine* their said da-
 " mages to £.28,993. 8s. 1d. and also the
 " said 40s. by the Jury aforesaid in form
 " aforesaid assessed, and likewise £.198. 7s. 7d.
 " to the said governor and company at their
 " request, for their costs and charges aforesaid
 " by the Court here of increase adjudged,
 " which said damages amount in the whole
 " to the sum of £.29,193. 15s. 8d. to be
 " levied of the goods and chattels of the said
 " *Humphry Morrice* deceased, at the time of
 " his death in the hands of the said *Catharine*
 " to be administered, if she hath so much in
 " her hands, and if she hath not so much in
 " her hands, then £.200. 7s. 7d. parcel of
 " the damages aforesaid, to be levied of the
 " proper goods and chattels of the said *Ca-*
 " *tharine*, and that the said *Catharine* be in
 " the mercy of the Court; and that the said
 " governor and company be also in the
 " mercy of the Court for their false clamour
 " against the said *Catharine* for the residue of
 " the aforesaid premises, whereof the said *Ca-*
 " *tharine* is by the Jury aforesaid in manner
 " aforesaid acquitted, and that the said *Catba-*
 " *rine* go therefore without day, and so
 " forth."

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Whatever is written in the margin of a policy of insurance is a warranty, and must be literally complied with.

This was an action upon promises brought by the plaintiff (an under-writer) to recover back the amount of a loss which he had paid upon a policy of insurance.

Plea the general issue.

This was tried before *Buller, J.* at the sittings after last *Easter* term at *Guildhall*, when the Jury found a special verdict, which stated,

That the defendant on the 14th *June* 1779, at *London*, gave to one *Alexander Anderson*, then being an insurance broker, certain instructions in writing, to cause an assurance to be made on a certain ship or vessel called the *Juno*, which were in the words and figures following; " Please get £.2000. insured on
" goods as interest may appear, slaves valued
" at £.30. per head, comwood £.40. per ton,
" ivory £.20. per hundred weight, gum copal
" £.5. per pound, at and from *Africa* to her
" discharging port or ports in the *British West*
" *Indies*; warranted copper sheathed, and sailed
" from *Liverpool* with fourteen six pounders,
" (exclusive of swivels, &c.) 50 hands or
" upwards, at 12 not exceeding 15 guineas.
" *Juno—Beaver. S. Hartley* and company,
" *June* 14th, 1779."

That the said *Alexander Anderson*, in consequence of the said written instructions from the said defendant, on the said 14th *June* 1779, at *London* aforesaid, &c. did cause a certain writing or policy of assurance to be made on the said ship or vessel called the *Juno*, in the words and figures following; (reciting the

De Hahn v. Hartley, Trin. 26 G. 3. B. R. Durnford and East, 1 V. 343.

Assumpsit, attempts of an under-writer to recover back amount of loss he had paid in his own wrong, the insured not having complied with the terms of the policy, of which the plaintiff was ignorant at the time of the payment.

policy) which was upon any kind of goods and merchandizes, and also upon the body, tackle, apparel, &c. of and in the ship *Juno* at and from *Africa*, to her port or ports of discharge in the *British West Indies*, at and after the rate of £. 15. per cent.

The verdict after reciting two memoranda, which are not material, then proceeded to state, that in the margin of the said policy were written the words and figures following; "Sailed from *Liverpool* with 14 six-pounders, swivels, small arms, and 50 hands or upwards, copper-sheathed."

That on the said 14th *June* 1779, and not before, at *London* aforesaid, &c. the plaintiff under-wrote the said policy for the sum of £. 200. and received a premium of £. 31. 10s. as the consideration thereof.

That the said ship or vessel called the *Juno* sailed from *Liverpool* aforesaid, on the 13th *October* 1778, having then only 46 hands on board her, and arrived at *Beaumaris*, in the *Isle of Anglesea*, in six hours after her sailing from *Liverpool* as aforesaid, with the pilot from *Liverpool* on board her, who did pilot her to *Beaumaris* on her said voyage; and that at *Beaumaris* aforesaid the said ship or vessel took in six hands more, and then had, and during the said voyage, until the capture thereof hereinafter mentioned, continued to have fifty-two hands on board her.

That the said ship or vessel in the said voyage from *Liverpool* aforesaid to *Beaumaris* aforesaid, until and when she took in the said six additional hands was equally safe, as if she had had fifty hands on board her for that part of the said voyage.

That divers goods, wares, and merchandizes
of

unconnected with the risque insured. The policy is, " at and from *Africa* to her port of " discharge in the *British West Indies*;" and the warranty is from *Liverpool*; which is antecedent to the voyage insured, and is merely a *representation* of the state of the ship when she set out on her voyage from *Liverpool*. Then, if it be only a representation, it is immaterial whether complied with, because it is found by the verdict that the ship was equally safe with the number of hands she had on board, as if she had had the whole number contained in the warranty. The warranty then can only relate to her being *copper-sheathed*: that part indeed was extremely material, because otherwise the risque would have been considerably encreased; and that extended to the voyage insured: but the other part of the marginal note was merely a representation, because the manner of sailing from *Liverpool* was unconnected with the risque insured.

But even if the Court should consider the whole as a warranty, it has been substantially complied with.

LORD MANSFIELD, *Ch. J.*—There is a material distinction between a warranty and a representation. A representation may be *equitably and substantially* answered: but a warranty must be strictly complied with.

Supposing a warranty to sail on the 1st of *August*, and the ship did not sail till the 2d, the warranty would not be complied with.

A warranty in a policy of insurance is a condition or a contingency, and unless that is performed, there is no contract.

It is perfectly immaterial for what purpose a warranty is introduced; but being inserted, the contract does not exist unless it is literally complied

complied with. Now in the present case, the condition was, the sailing of the ship with a certain number of men; which not being complied with, the policy is void.

ASHHURST, J.—The very meaning of a warranty is to preclude all questions whether it has been *substantially* complied with: it must be *literally* so.

BULLER, J.—It is impossible to divide the words written in the margin in the manner which has been attempted; that that part of it which relates to the copper sheathing should be a warranty, and not the remaining part. But the whole forms one entire contract, and must be complied with throughout.

Judgment for the plaintiff.

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ESSAY IV.

Of Trials at Bar.

Vide ante Essay II. Head III. The *Queen v. the Bailiffs and Burgeses of Bewdley*. D° IV. *Bright, exor. of Crisp v. Eynon*. D° IX. (3.) *Rex v. Woodfall*. D° IX. (6.) *Argent v. Sir Marmaduke Darell*. — *Leighton v. Sir Edward Leighton*. — *Smith, ex. dm. Dormer v. Parkhurst*; et IX. (8.) *Richards v. Symes*.

If a new trial shall be granted after a trial at bar.

A VERDICT contrary to the opinion of the Court.

Upon a trial at bar by a *Middlesex* Jury, where the issue was whether the copyholders of a manor (of which Sir *George Reynolds* was seised) ought by the custom, upon their admittance, to pay fines, certain, or uncertain? And upon the whole evidence (although precedents were produced both ways) the Court was satisfied that the copyholders ought to pay uncertain fines; but the next morning the Jury came and gave their verdict that the copyholders ought to pay certain fines; and for this cause, and also upon *affidavit*, that several of the principal freeholders named in the *venire facias* by *Horne*, secondary, were never summoned

Wheeler v. Honour, M.
13 Car. 2. B. R.
1 Sid. 58. 1 Keb.
154, 166. Ray.
41.

Question if copyholders of a manor ought upon their admittance to pay fines certain or uncertain?

Obj. several freeholders named in the

venire facias
were not sum-
moned.

1 Keb. 40, 41

Three actions
against an hun-
dred by three
Welsh drovers.
—One verdict
for, two verdicts
against the hun-
dred.—New
trial in the first,
after a trial at
bar.

If debt lies
for a fine against
a copyholder,
Y. Sid. 176, 177.

moned, it was moved two days after to have a new trial; but because there was full evidence, the Court would not grant a new trial (unless the other party would consent) for it was said that trials at bar were solemn and of great authority; and although the Court was not satisfied, yet the Jury, who were the proper judges of the fact, were well satisfied. And it was not known that more than two new trials had ever been granted, after a trial at bar; one of which was in this case; three *Welshmen* were robbed in *Surrey*. One brought his action upon the statute, and a verdict was found for the hundred: the other two brought their actions, and verdicts were found against the hundred (all of which were tried at this bar *Anno* 1657) and upon this the court granted a new trial in the first, and they had great reason so to do, for there were two verdicts against one. The other was granted because *excessive damages* had been given for words, viz. £. 115.

Nota, It was said by *Twisden* and *Windham*, Justices, and not denied by any one, that, in this case, the lord might bring an action of debt against the copyholder, and so he is not without remedy: and *Twisden* said that so it was held by *Forster*, Justice, 15 *Jac.* which was not denied, but it was said that the opinion of *Bacon* was, that the lord could not have debt for a fine against his copyholder.

Trial at bar granted, where a justice of the King's Bench, or a master in Chancery is concerned.

Sir William Morton, one of the justices of this bench, brought debt against *H. and S.* for tythes, *scil.* for not setting them out, &c. and in this action the title of a parsonage in the county of *Oxford*, which *M.* had as executor to his son, was to be in question, and a motion was moved for a trial at bar the next term, which was granted without any *affidavit*, because, if one of the justices of the bench, or a master in *Chancery* is concerned, it is a good cause for a trial at bar, be the value what it will; and a trial was granted, and the next term it was tried, and it was held as before, that debt lies upon the *stat. 2 E. 6.* by executor for tythes, but not *against* an executor.

There was a verdict for the plaintiff, but he absented himself from the Court, the day of the trial, although he was present at other times when the cause was moved.

Information for extortion against a clerk of assize, shall be tried at the bar.

Difference between a cessat processus, and nolle prosequi, by the Attorney General.

An information was exhibited here against *B.* for extortion in the office of clerk of the assize, in the county of *York*, and it was moved, after the defendant had pleaded *not guilty*, to have a trial here at bar, and it was opposed by the King's counsel, because they had a great

Morton v. Hopkins and Spencer, H. 20 and 21 Car. 2. B. R. 1 Sid. 407.

1 Vent. 30.

Executor may have debt upon the *stat. 2 E. 6.* of tythes, but it does not lie against an executor. Hob. 188.

Rex v. Benson, T. 21 Car. 2. B. R. 1 Sid. 420.

Information for extortion. 1 Vent. 33. 2 Keb. 521.

number of witnesses in *Yorkshire*, and it would be a great expence to the prosecutor to bring them up here, and that it was well known in the country whether he was guilty or not. But, because this was a great offence, if he was guilty of it, the *senior* judge of the circuit would have his place, and because nothing ought to be tried, before those who are to have advantage by it, it was ordered that the trial should be at bar; and this term the Jury appeared, and whilst they were swearing, the King's attorney came into court and said that he had entered a *cessat processus*: but the Court notwithstanding proceeded in swearing the Jury, and told the Attorney-General, that he should enter a *nolle prosequi* before they would stop, and then the Attorney-General commanded the clerk of the Crown to enter a *nolle prosequi*, which was done, and the Jury discharged. 1 Cro. 254.

The jury appearing, shall not be dismissed upon a *cessat processus*, without a *nolle prosequi*.

Trial at bar the last paper day.

Lord Bellamont's case. Pasch. 12 Will. 3. B. R. 2 Salk. 625.

The Attorney-General moved for a trial at bar last paper-day in the term, in an action against the governor of *New York* for matter done by him as governor; and granted, because the King defended it.

Where the venue is in London, there cannot be a trial at bar.

Anonymous, Pasch. 5 W. & M. B. R. 2 Salk. 644. Trial at bar. Vide ante.

A cause cannot be tried at bar where the action is laid in *London*, by reason of their charter.

Trial

Trial at bar where to be granted, or denied.

Where there is value or difficulty, we are bound of common right to grant trials at the bar. *Inquisitiones de grossis et pluribus articulis, quæ magna indigent examinatione capiantur coram Justiciariis de Bancis. Stat. West. 2. c. 30. per Holt, C. J.* yet *Trin. 1 Ann.* it was denied, because the plaintiff was poor, unless the defendant would agree to take *nisi prius* costs. *Et postea scil. Trin. 4 Ann. B. R.* between the trustees of my Lady *Sandwich* and my Lord *Sandwich*, though the estate was £.3000. *per annum*, a new trial at bar was denied, because the title of the lessor of the plaintiff being from the defendant himself, there would be nothing to do but to prove the executing of a conveyance.

Lord Sandwich's case,
Trin. 2 Will. 3.
B. R. 2 Salk.
648.
Vide ante, & post.

When a trial at bar is to be moved for.

If *H.* would have a trial at bar in *Easter Term*, he ought to move for it in *Hilary Term*; if in *Michaelmas Term*, he ought to move for it in *Trinity Term*, except where lands lie in *Middlesex*; and anciently there was no other notice given of such trial, but the rule in the office; but now there must be fifteen days notice. *Per Holt, C. J.*

Turner v. Barnaby, Pasch. 1 Ann. B. R. 2 Salk. 649.
Vide ante et post.

Trials at bar not denied to officers of the court, or barristers.

Upon a *scire facias* brought against Sir Samuel Astrey, for his place of clerk of the crown in the Court of King's Bench, and issue joined thereupon;

Sir Samuel Astrey's case,
H. 2 Ann. B. R. 2 Salk. 651.

Vide 2 Mod.
651. 6 Mod.
123. Salk. 625.
2 Keb. 133;
164. 1 Cro. 248.

thereupon; Sir *Samuel Astrey* moved that the issue might be tried at the bar. The Attorney-General opposed it; but the Court said, a trial at bar was never denied to any officer of the court, nor hardly to any gentleman at the bar; and though Mr. Attorney was never bound to consent to a trial by *nisi prius* in the Queen's case, yet they did not see how he could refuse a trial at bar, where it was reasonable to try it there; for the stat. *West. 2. cap. 30. is attinentur*, that they may be determined there, *qui magna indigent examinatione*.

A new trial refused after a trial at bar, though the Court much dissatisfied with the Jury.

Gay v. Crofs,
T. 1 Annæ, in
B. R. 7 Mod.
37. 1 Salk. 190.
Mandamus to
fwear in a com-
mon-council-
man of Totnefs.
Corporation.
Verdict.

Trial at bar.

The plaintiff brought an action on the case for a false return to a *mandamus* to swear him *common-council-man* for the borough of *Totnefs*, which, by charter from *Queen Elizabeth*, the manner of their election was chalked out for them; and a usage was given in evidence to a jury at the bar, that the election had gone quite contrary, which usage was allowed to be good evidence of a by-law whereupon it was founded? So the counsel on both sides consented to have it found specially, and to have it determined by the Court; whether such a by-law and a long usage pursuant to it, could alter the direction, or rather annihilate the direction of the charter? And the Jury having given their verdict in private over night, said, that they had found the matter specially, and the next day in court delivered their verdict for the defendant generally, and would give no reason for it, nor be moved to depart from it. And hereupon a new trial was moved for, and the case of

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Wood and Gunston in Stiles, and a case of the *Welsh* drovers were quoted for new trials, after a trial at bar. And though the Court were very much dissatisfied with the Jury, and *Holt* said, he never had known the like, and that he would have but little value for the verdict of a jury that would not, at a judge's desire, declare the reason which had induced them; and that as the judges do publicly declare the reasons of their judgments, and thereby expose themselves to the censures of all that be learned in the law, and yet there is no law obliges them to it, but it is for public satisfaction; so the jury ought, for the same reason, to declare the reason of their verdict, when required by the court. Notwithstanding all this, it being a trial at bar, the Court would not grant a new trial.

V. ante VI.
V. ante in the
case of *Wheeler*
v. Honour.

Qu. If this determination was not wrong?

Application to put off trial refused, the affidavit being insufficient.

Affidavits to put off a trial at bar, set down for the first *Tuesday* in term, upon account of the witnesses being not likely to be there, denied; for that it was not sworn endeavours had been used in such convenient time to have them, that without an unforeseen accident they would be at the trial at the set time.

Gravenor v.
Fenwick, H.
1 Annæ in
B. R. 7 Mod.
121.
Trial.

New trial denied after trial at bar, upon insufficiency of the affidavit.

After a trial at bar, and verdict for lessees in ejectment, a new trial was moved for upon the

Gravenor al'
Gravenor and
Fenwick, H.

1 Annæ in
B. R. 7 Mod.
r56. 2 Salk. 650.
S. C.

New trial de-
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at bar.

Affidavit.

V. ante.

the merits of the cause, and also upon an affidavit brought into Court containing in substance, that the defendant's witnesses were kept back by a report spread in *Holland*, where they were in their way to *England*, that the witnesses that were already come over, had been laid by the heels; but the affidavit did not name any who had spread the report, or that it was by the agents or persons employed by *Fenwick*. And though the Court were dissatisfied with the verdict, upon several reasons, one whereof was, that the trial lasted about sixteen hours, and abundance of evidence was given on both sides, yet the Jury were agreed on their verdict in half an hour's time; yet the Court would not grant a new trial; and the case of *Gay* and *Cross*, heretofore, was remembered; for the Court declared, that after a trial at bar they would not easily grant a new trial, more especially in ejectment, where the first verdict is not peremptory; and where there is no foul practice made appear in the Jury, or party for whom the verdict was, as keeping back of witnesses, &c. in which cases alone it was discretionary in the Court to grant it. And here they begged leave to amend their affidavit, which was opposed for this reason; that now they had learnt of the Court what would do their business, it would be dangerous to let them in to swear it: to which *Holt* said, that it was frequent in *Chancery*, after a witness had sworn before a master, to examine him again *viva voce* in Court. But Serjeant *Powis* replied, that it was no frequent thing so to do; for in all his time, he had known it done but twice. And *Powell* declared his dislike of mending affidavits where the party knew

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knew before what was necessary, and had not sworn it.

In 2 Salk. 650. S. C. it was said as to issues out of Chancery, they being only to satisfy the conscience of the chancellor, are not *stricti juris*; and that in the principal case a new trial was denied, *contra opinionem (ut videbatur) capital. justiciar'*. Sed. qu.?

A witness examined at a former trial of an issue between the same parties, and who has been examined in the cause, in case he dies, not only his depositions may be read, but what he swore at the former trial may be given in evidence.

On the hearing of this cause, the *Lord Chancellor* directed an issue to be tried at the then next assizes at *Dorchester*, whether by the general words of the deed in question, the lands in question were intended to pass; whereupon at the trial, and which was by a special jury, a verdict passed for the plaintiff; but upon a motion for a new trial, it being sent by the *Lord Chancellor* to the Judge to certify, whether this was proper to be tried again, Mr. Justice Price did certify, "That evidence was given on both sides, and that he should have thought this case proper to be tried again, but that one of the witnesses examined for the plaintiff was since dead, by means whereof the plaintiff might suffer on such new trial, and that therefore he rather inclined against any new trial."

After which certificate, there was another motion for a new trial; and the *Master of the Rolls* being present in Court, and his lordship desiring

Coker v. Farewell, Hil. 1729.
2 P. Wins. 563.

Lord Chancellor King,
Master of the Rolls, 2 Eq. Caf. Abr. 723.
Pl. 5.

Evidence on both sides.
Two trials.

desiring his thoughts on this matter, his Honour said, the only objection to the new trial, appeared to be the death of the witness, and though it had been said, that the weight of a living witness would be greater than depositions, yet it was his opinion, that since this witness had been examined in the cause, and was dead, the depositions might be read; also, as the testimony which the witness had given at the former trial, might be given again in evidence against the same parties, he should rather think, that the other side had suffered by the death of the witness, since they had thereby lost the advantage of cross-examining. And the Court ordered a new trial to be had at the bar of the Common Pleas, where, after much evidence on both sides, the Jury found a verdict for the defendant, which was contrary to the former verdict.

And now a trial was again moved for; upon which it being sent back to the Judges of C. B. to know whether this cause was proper to be tried again, the *Chief Justice* acquainted the *Lord Chancellor*, that there had been very strong evidence given on each side, insomuch that he could not have blamed the verdict, on which side soever it had been given, and that he could not say this verdict was against evidence.

Afterwards another application was made for a new trial, when it was insisted, that this matter relating to an inheritance, it would be very hard to have the right determined by one trial, though at bar, and divers cases were cited where new trials were granted after a trial at (a) bar; and this ought the rather to be done in the present case, where there had

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been verdict against verdict, and consequently the matter seemed to be left at large.

Sir Ed. Leighton, ante Essay II. IX. (6.)

But the *Chancellor* and the *Master of the Rolls* denied a new trial; saying, otherwise there would be no end of suits; that a trial at bar, where more time might be allowed, and the party was put to more expence, was of greater weight than one by *nisi prius*; that the intent of the Court in sending the cause to be tried at bar was, that it might be final; but this case was the stronger, as the issue to be tried related only to the intention of the party, and not to any legal title, which question might have been determined at the hearing, without ever sending it to a trial; and here being a trial at bar, this might justly claim a preference to a trial by *nisi prius*, and was sufficient to satisfy the conscience of the Court; but that still, if the party, against whom the decree was, thought he had a legal title, the Court did not debar him of that.

The Court lays more weight on a trial at bar than at nisi prius, from the solemnity of it, and the length of the examination.

LORD CHANCELLOR.—Where there are two trials, and the last was at the bar, this Court has suffered the last to prevail; and to lay down a rule that there must be three, will be attended with great expence: what turns in favour of the last trial, is the solemnity and length of examination, and the reason for directing a trial at bar is in order to that.

The last verdict here was on further evidence, which makes this a stronger case than the common one, where there are two trials

The Attorney General, at the relation of Clarke and others, versus Montgomery, July 28th 1742. 2 Atk. 378.

on the same evidence, and therefore I shall not grant a new trial on that ground.

An original motion must be made for a new trial, and the Court will not answer a petition for it, where the cause comes on upon the equity reserved.

I do declare, that for the future, I will not answer a petition for a new trial, where the case comes on upon the equity reserved, for I do expect an original motion to be made for that purpose, otherwise it is tending to great delay.

There were several proceedings in favour of the will, which make it reasonable to hear what the Judges say to the verdict.

Let it stand over to the first day of rehearing in the next term, for that purpose.

Trial at bar granted, upon consideration of the consequences of a conviction upon an information.

Rex v. Foley
and Harley,
E. 3 Geo. B. R.
1 Stra. 52.

Information for taking 3s. 4d. for registering a warrant of attorney, contrary to the lottery act, which says it shall be entered without fee or reward, and all persons offending shall be incapable to hold any place.

The defendants moved that they might have a trial at bar, for though the question seemed very short, whether they took the fee or not; yet the consequence was very considerable: the defendants are auditors for life, and that is a freehold of which they will be divested by a conviction upon this information. *Pasch. 9 Anna Regina v. Harcourt, scire facias* to repeal letters patent, and there a trial at bar was had. *Sid. 420.* The Crown, it is true, may sue any where, but when the suit is commenced, it is in the power of the Court.

On the other side it was insisted, that the Court could not take notice of what would be the

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the consequences of a conviction; that the question was short, and the *onus probandi* upon the Crown, who might try the cause where it pleased.

Powys, Eyre, and Pratt, were for a trial at bar; but the Chief Justice said, the defendants ought not to pray a trial at bar in an issuable term. A trial at bar was granted for next term. *Vide post Rex v. Johnson.*

Trial at bar granted, on the ground of value.

In *ejectment* on the demise of Lord *Coningsby*, the plaintiff moved on the common affidavit of value, for a trial at bar, which was opposed by the defendants on another affidavit, that they severally held but small parcels of lands by different titles: and this is putting it in the power of the plaintiff, by joining several together, to bring the owner of but £. 5. *per ann.* to the bar. *Sed per Curiam*, there must be a trial at bar, for if the plaintiff makes but one title to the whole, he has a right to join them all together. It was moved that the lessor, having privilege, might name a good plaintiff to be liable to costs; but the Court denied it with some resentment, saying it had been often attempted, and as often refused.

Preston v. Lingen, M. 8 Geo. B. R. 1 Stra. 479. Trial at bar where grantable.

A new trial granted, after a trial at bar.

A corporation were all invited to a treat, when one of the aldermen desired leave to resign, upon which his resignation was taken, and the plaintiff at the same time chosen and sworn in.

Sir Christopher Muirgrave v. Nevinston, E. 10 Geo. B. R. 1 Stra. 584. L. Raym. 1358. The resignation of an al.

derman, and election of another in his place, at a meeting not convened for corporation business, adjudged fraudulent and void.

Upon a trial at bar the Jury found it a good election; and the Court granted a new trial, it being fraudulent, and it appearing one of the members was not there 'till after the election, and there was no summons to meet to do such a corporate act, that the members might come prepared. The meeting likewise was not in the *Mootball*, but at a tavern, and it was a plain surprize, and even all not present.

As to the point of its being a trial at bar, the Court made no difficulty of that, since the case of *Bewdley*, and another of Sir *Joseph Tyley v. Roberts*, in *C. B.* where on a trial at bar whether *compos* or *non compos* the Jury found against the weight of the evidence, and there was a new trial. The case in *Stiles* (which is the first new trial *in print*) was after a trial at bar; and in the case of an alderman of *Derby* he was afterwards ousted upon a *quo warranto*.

Et per RAYMOND, Justice. — My Lord Chief Justice *Holt* used to say, he was of opinion that the practice of granting new trials was much ancients than the case in *Stiles*; since we meet with challenges that the party was sworn on the former trial, and therefore ought not to be a juror again.

A corporator on a recent prosecution must prove receiving the sacrament within a year.

N. B. — As to another of the corporators of *Apulby*, he was put to prove the receiving the sacrament within a year before his election, it being recent, and therefore the Court required it, though no notice was given him for that purpose.

N. B. — By *stat. 5 Geo. 1. c. 6. s. 3.* no person chosen into any corporate office mentioned in the *stat.* shall be removed or prosecuted, nor any incapacity, disability, forfeiture,

or

or penalty be incurred, by omission to take the sacrament, unless removed, or prosecution commenced within six months after being placed or elected into office, and the prosecution be carried on without wilful delay.

Vide 2 Burr.
1016.

Trial at bar granted in an information against a Justice of peace for a misdemeanor in his office.

An information was exhibited by order of B. R. against the defendant for neglects and abuses in his office of justice of the peace, in relation to deer-stealers; and it was moved on behalf of the Crown, on affidavit of the defendant's having £.700. *per annum*, and there being above thirty witnesses for the prosecutor, that it might be tried at the bar: and the case of *Regina v. Wakefield*, the town-clerk of *Litchfield*, who fixed up a paper reflecting upon a jury, which was tried at the bar, was mentioned; and also the case of auditor *Harley*, where the matter in dispute was a trifle, but like to be of long examination; upon which authorities the Court granted a trial at bar in this case. Mr. Attorney said, had it been an information exhibited by him, he would have had a right to bring it to the bar if he had thought fit. N. B. The defendant was convicted and fined £.400. and committed 'till paid.

Rex v. Johnson, M. 12 Geo.
B R. 1 Stra.
644.

Vide ante Rex
v. Foley and
Harley.

v. Id.

Motion,

Motion, before issue joined, for trial at bar refused.

Cafe of the
borough of
Christ Church,
E. 12 Geo.
B. R. 1 Stra.
696.

Upon a motion for a trial at bar, which was consented to on both sides, it appeared issue was not joined: and the Court refused to grant it, saying it was below the dignity of the Court to do it, 'till they knew whether the issue joined would be a matter of difficulty or not.

Sed. qu. vide ante.

In what cases of the Crown a trial at bar is demandable.

Rex verf.
Robertum
Hales, M.
2 G. 2. B. R.
2 Stra. 816.

Mr. Attorney moved for a trial at bar, on an information filed by him for forgery. But it not being carried on at the expence of the Crown, but of a private prosecutor, the Court held that he must make out the usual requisites to bring it to the bar. So the motion was denied. At another day, Mr. Attorney moved on an authority from the king to prosecute, and it was granted as of right to the king in his own cause. In *Hil. sequen'* it was tried, and the defendant convicted. And in *Trin. sequen'* being called to judgment, he produced a pardon, which was allowed; and being only for a misdemeanor, he was not put to go to the bar, or plead it upon his knees.

Where the venire is laid in London, there cannot be a trial at bar, the citizens not being to be brought out of the city. *Vide ante.*

In an appeal of Murder *Castell, vid. v. Bambridge et Corbet*, (2 Stra. 855.) it was moved to fix a time for the trial, the appellees offering to take short notice; but it being by original, there was a necessity to have fifteen days between the *teste* and the return of the

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distringas, and they could not be tried on the *venire*, because being in *London*, there could be no trial at bar, (the citizens not being to be brought out of the city) and as it must be tried at *nisi prius*, there must be a *distringas*.

Trial at bar in an action for crim. con. upon application of defendant, he having many witnesses to examine, &c.

This was an action for criminal conversation with plaintiff's wife; and the damages were laid for £. 50,000. defendant moved for a trial at bar, upon an affidavit that he had upwards of twenty witnesses to be examined. Rule granted to shew cause, which was afterwards made absolute, plaintiff having liberty to examine a witness in an ill state of health, before a judge in the mean time, and defendant consenting to waive his privilege of parliament.

Darnal for defendant; *Chapple* for plaintiff. *Vide post.*

Ld. Hillsborough v. Jefferyes, Esq. T. 7 & 8 G. 2. Barnes, 438.

Reasons for granting, or refusing trials at bar, especially where there are old infirm witnesses who cannot travel to Westminster, and the cause may be sooner tried at the assizes.

A rule to shew cause why the trial should not be at bar, was founded upon an affidavit that the premises in question were of the yearly value of £. 100. and upwards; and that a strict and careful examination of the title would be requisite. At the time of shewing cause it was also alledged on plaintiff's behalf,

Frost against Whadcock, alias Avery and others, on the demise of Avery, in ejectment, E. 14 Geo. 2. Barnes, 447.

that he had a great number of witnesses to examine : and that the point to be tried was *compos vel non* in *William Avery*, at the time of making his will, under which the defendant *Whadcock* claims his right. On behalf of defendant it appeared, that they had some ancient and infirm witnesses to examine, who could not travel to *Westminster*.

Vide ante.

Per Cur' : We are not, according to the course of the Court, bound down by the value of the premises in question, which is sworn to be £. 100. *per ann.* As to strict examination, it is necessary in all cases, and is nothing with respect to a trial at bar. When a long cause is to be tried, a judge, upon notice, will take a day extraordinary at the assizes, where an examination of a great number of witnesses is most proper and least expensive. There is no nicety in this point, or difficulty, so as to require the attention of the whole Court. Ancient witnesses grow weaker every day, and often are not able to travel to *Westminster*. Let the rule be discharged. Plaintiff prayed leave to examine an old witness before a judge, upon interrogatories. But *per Cur'*, that cannot be done without consent. A cross examination cannot be supplied by depositions. If a trial at bar was ordered, it could not be 'till next *Michaelmas* term ; and before that time the assizes will be held. *Birch* for plaintiff ; *Willes* for defendants.

Motion, before appearance, for trial at bar, granted.

Roe against
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ment, on the

Rule for tenants in possession to shew cause
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at bar next term. Objected on the part of Lady *Wentworth* the landlady, Sir *Butler's* widow, That a trial at bar cannot be moved for by plaintiff 'till after appearance, and the time to appear will not expire 'till four days after this term. Two rules of the Court of King's Bench produced, one by consent, the other not by consent, except as to *nisi prius* costs, where trials at bar had been ordered before appearance. Rule absolute for trial at bar on 8th *May* next. If plaintiff's motion had not been received before appearance, no trial at bar could be appointed 'till next *Michaelmas* term. Lady *Wentworth's* counsel prayed the conditional rule, and to defend for part; which was granted, and six weeks time to describe the part defended for.

Prime & al' for lessors of plaintiff; *Skinner & al'* for Lady *Wentworth*.

The grounds for granting a trial at bar are, great value, probable length, and probable difficulties in the trial.

The Court may lay the party applying under the terms of receiving nisi prius costs, and paying bar costs.

This was an application for a trial at bar. *Kenyon*, some time before, had obtained a rule to shew cause, and *Partridge* this day shewed for cause, (upon affidavits) that the lessor of the plaintiff was in such indigent circumstances, as not to be able to bear the expence, and that one of his witnesses was a woman of above eighty years of age, who might die before a trial at bar could be had. The value of the premises was stated to be about £.2000. a

demise of
Cholmondeley
and his wife,
for a considerable
estate in
Yorkshire late
Sir Butler
Wentworth's,
deceased, H.
18 Geo. 2.
C. B. Barnes,
455.

Holmes,
lessee of
Brown, against
Brown, T. 20
Geo. 3. B. R.
Doug. 420.

year ; and the question, whether a codicil to a will by which they were devised was duly executed. *Partridge* cited Lord *Sandwich's* case in *Salkeld*, (a).

(a)
V. ante.

Kenyon, in support of the rule, said, that the grounds on which a trial at bar ought to be granted, were, the great value of the subject matter of the litigation, the probable length of the inquiry, and the likelihood that difficulties might arise in the course of the trial (1). He then endeavoured to shew, that these reasons co-operated in this case.

(1)
The words of the statute of Westminster, 2 (13 Edw. 1 cap. 30.) are ;
" Sed inquisitiones de
" grossis &
" pluribus articulis, quæ
" magna indigent examinatione,
" capiantur coram Justitiis
" ciuitatis Bancei."

LORD MANSFIELD absent.

The Court were of opinion, that this was a case where it was fit that a trial at bar should be granted ; but said, that, as it was a favour asked by the defendant, they would lay him under the terms, that, if he succeeded, he should only have *nisi prius* costs ; but, that if the lessor of the plaintiff were to succeed, he should have bar costs, and that the old witness should be examined upon interrogatories, and her depositions read, if she should die before the trial. It was also (by consent) made part of the rule, that the cause should be tried by a *Middlesex* jury, instead of one from *Norfolk*, where the premises were situated.

The rule made absolute.

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Upon an application for a trial at bar, the Court will, in every case, exercise its own discretion, upon the peculiar circumstances thereof. Where a fair trial cannot be had in the county where the matter arises, the trial will be awarded in the next English county where the king's writ of venire runs.

A rule was made absolute, no cause being shewn, on a motion by *Erskine*, for leave to enter a suggestion on the record in this action, "that the corporation and citizens of *Chester* were interested in the event of this suit, and therefore, that a fair and impartial trial could not be had in the county of the city of *Chester*."

Erskine then moved for a trial at the bar of this Court; and relied upon the importance of the question to be agitated. Lord *Holt* says, that a trial at bar is of common right; and in cases of intricacy it is peculiarly requisite.

It will be sufficient therefore to induce the Court to grant it in this instance, by stating to them the magnitude of the subject in dispute, and the variety of issues which are to be tried.

The principal question is, whether the right of electing aldermen in the city of *Chester*, is vested in the citizens at large, or in a select body?

There are twelve issues on this record.

1st. That this is not a body corporate by prescription.

2d. *Non concessit*, by the charter of the 27 of Car. 2.

Rex v. Amery,
Trin. 26 G. 3.
B. R. Durnford
and East, 1 V.
363.

3d. That the charter of *Car. 2.* was not accepted, as to the election of aldermen.

4th. That certain persons appointed aldermen under that charter, did not act as such.

5th. That the mayor, aldermen, and common-council, have not used to elect under the charter.

6th, 7th, and 8th, Relate to the qualification and election of the defendant, to the office of alderman.

9th. That the charter of *Car. 2.* was accepted, as to all matters contained both in the plea, and replication.

10th. That the order of amoval in the time of *Jac. 2.* was not signified.

11th. That the charter of restoration of *Jac. 2.* was accepted.

12th. That the charters of *Hen. 7.* and *Elizabeth* are still in force.

These issues must necessarily give rise to many intricate questions of evidence, and in fact go to the very existence of the corporation. In the *Maidstone* cases (a), the Court granted a trial at bar upon similar grounds, because the question to be tried involved in it the constitution of the borough.

The Court granted a rule to shew cause.

Bearcroft, Cowper, Bower, Leycester, and Manley shewed cause, and contended, 1st. That the number of issues on a *quo warranto* information, was not of itself a sufficient reason to induce the Court to grant a trial at bar; for the same reason would equally extend to every *quo warranto* information; neither is there any peculiar difficulty arising from these issues to warrant the application; for the principal question is upon the acceptance of

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the charter of the 27 *Car.* 2. which must be proved by the records of the corporation.

But if the Court grant a trial at bar, they cannot summon a jury from the county palatine (b); there never having been an instance of that kind hitherto, except in cases of treason and error. Then 2dly, if the Court should not grant a trial at bar, the next question is, in which county this information shall be tried.

(b)
4 Inst. 212.

It is not a matter of right to have a record sent into a county palatine, as being the next adjoining county; and if it be only a matter of discretion in the Court, they will not think it adviseable to send this question to be tried in the county palatine of *Chester*, as the assizes are held in the heart of the city, where the parties concerned have extensive connexions, who are interested in the event of the trial.

It appears from all the cases (a) upon the subject, that it is not a matter of right to send a record down by *mittimus* to be tried in a county palatine, unless the matter arises within that county. All the cases upon this subject are collected in the case of the *King* and *Cowle* (b), which arose in the town of *Berwick*; there, though *Durham* was in fact the next adjoining county, yet the court upon full consideration sent the issue to be tried in *Northumberland*. Wherever it is suggested that a record should be sent down to be tried in the next adjoining county, it means the next county into which the king's writ runs. So, where the matter arose in *Ireland*, the *venire* was directed to the sheriff of *Salop* (c), though the *Welsh* counties, and the county palatine of *Chester* are both nearer. Again, the whole of *Flintshire* joins to the county palatine of *Chester*, and no part of it to

(a)
19 H. 6. fo. 12.
b. pl. 31. 2 Rol.
Abr. tit. Trial
L. 1. pl. 6, 7, 8.
Bro. Abr. tit.
Trial pl. 27.
4 Inst. 205.
(b)
2 Burr. 834.

(c)
2 Rol. Abr. tit.
Trial, I. pl. 8.

Salop, and yet there is no instance of a record in any action arising in *Flintshire* having been sent to *Chester*. Wherever there has been an exception to this general rule, it has always been by consent, as in the case of the *King* and *Johnson* (d).

(d)
Hil. 7 Geo. 2.

Wilson, *Erskine*, *Wood*, and *Tapping*, admitted, as to the first question, that whether there shall be a trial at bar or not, depended upon the discretion of the Court; but that discretion ought to be regulated by law, and founded on precedent; and the *stat of Westm. 2.* authorises the party to claim a trial at bar, in every question of importance. A *quo warranto* information, on which depends the existence of a corporation, is of greater consequence than a mere question of right between two individuals. One of the issues to be tried is, whether the charter of *Car. 2.* was accepted as to the election of aldermen, and upon that a considerable question of law will arise, whether a charter can be *partially accepted*. Another issue is *non concessit*, which involves a question, whether the king can grant otherwise than under the seal of the county palatine; and whether the grant was made to persons capable of taking it.

(a)
V. ante.

In Lord *Sandwich's* case (a) the Court said, that where there was value and difficulty, they were bound of common right to grant trials at bar.

As to the doubts which have been thrown out respecting the jurisdiction of the court, and their power to summon a jury to their bar from a county palatine, there can be no foundation for them; for wherever the court can send down a record to be tried, they must likewise have a power of summoning a jury from

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from the same place to attend them at their bar. Now here the court might certainly send down this record to the Chief Justice by *mittimus*; and if the jury should be summoned to attend at the bar of this Court, and they refused to attend upon the ground of an exclusive jurisdiction, the Court might proceed against them for a contempt. In the case of the *King and Godfrey* (b), the sheriff of the city of *Canterbury* was fined £. 100. for returning to a *distringas*, that the mayor and commonalty of the city were exempted from serving on juries; in consequence of which a jury was afterwards returned. The cause of *Lockyer* against the *East India Company* (c) was tried at bar by a special jury of merchants from the city of *London*, notwithstanding there had been a different decision upon the same point in *E. 5 W.* and *M.* (d) by reason, as it was said of their charter. So also in the case of the *King and Lambe* (e), an application was made to the court for a new trial, because the warrant for a *tales de circumstantibus* was only signed by his Majesty's Attorney-General, whereas it ought to have been procured from the Attorney-General of the county palatine; but that was held to be no good ground. The case of the *King and Johnson* (f), which was sent down to be tried by *mittimus* in the county palatine of *Chester*, and where a similar question arose upon the acceptance of a charter of 16 *Car. 2.* does not appear upon the face of it to have been sent down by consent.

As to the second point: whenever the matter cannot be tried in the place where the cause

(b)
Hard. 389.

(c)
M. 2 G. 3.

(d)
2 Salk. 644. V.
ante.

(e)
4 Burr. 271.

(f)
Hil. 7 G. 2.

(g)
2 Burr. 1330.

(a)
2 Lev. 33.

cause arises, it must necessarily be tried in the next adjoining county; the *King* against *Harris* (g). This rule is supported by a variety of precedents. One in particular is more immediately applicable. In the case of the *Mercer's* and *Ironmonger's* Company of *Chester* against *Radford* (a), the exchequer court of equity of *Chester*, granted a trial in the county palatine, because an impartial trial could not be had in the county of the city.

Such has always been the invariable rule, unless both parties have consented to a trial in another place: and even in those cases, where the matter has arisen in a distant county, and there has been a trial at bar by a jury of the county of *Middlesex*, the form of the suggestion has always been, that the jury were summoned from the next adjoining county. And in the present case, the county palatine is the next adjoining county, where the record may be sent by *mittimus*.

LORD MANSFIELD, *Ch. J.*—All questions concerning trials at bar must depend upon their own circumstances. Many informations in the nature of a *quo warranto*, upon which the existence of corporations depended, have been tried at *nisi prius*, and many at bar. The only rule therefore to go by is, the judgment which the court shall form on the nature of the issues and their dependencies. Now, it seems to me as clear as possible, that no question of magnitude can arise in this case to render a trial at the bar of this Court necessary. Many of the issues will admit of no litigation, such as, that it is a corporation by prescription; and the granting, in fact, of the charter by *Car. 2.* and

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and some others, are only consequential. The great question is on the *acceptance* of the charter of *Car. 2.* but that cannot involve in it much difficulty. We know the obloquy which charters granted at that time lay under. As my Lord *Hardwicke* said (b), they have never received any countenance in *Westminster Hall*; and he never would give any opinion in support of them, unless the strongest evidence was laid before the court of their having been accepted and uniformly acted under. Therefore there is no ground in this case for a trial at bar.

(b)
In. R. v. John,
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Then the next consideration is, where it shall be tried. Now, with regard to that, all local questions which arise in a county palatine, must be tried there (c). In the present case, the matter arises locally in the county of *the city of Chester*: but, by the suggestion which has been entered upon the record, it appears, that an impartial trial cannot be had there, therefore it must be tried in the next county: but that must mean the next county where the king's writ of *venire* runs. The county palatine of *Chester* cannot be called the next county for this purpose, because the king's writ of *venire* does not run there. All this I take to have been fully, finally, and in point established in the *Berwick* case. And though *Northumberland* was not there said expressly to be *the next county where the king's writ runs*, yet it was taken for granted that it was so.

(c)
4 Inst. 212.

For the same reason, where a matter arising in *Wales* is tried in the next county, it is never tried in the county palatine of *Chester*, but always in the next *English* county where the king's writ runs.

BULLER,

BULLER, J.—It is observable, that there is no instance, except that of the *King* and *Johnson*, where the court has ever sent a record by *mittimus* to be tried in a county palatine, where the fact did not arise there; and I very much doubt the power of the court to do it. It is not quite clear when the doctrine of sending records by *mittimus* into counties palatine was first taken up; but in the 11 *Will.* 3. (a), the Court expressly said, that they could not order a trial in the county palatine of *Lancaster*, and therefore they sent the record to be tried in *Yorkshire*, as being the next county.

(a)
Vid. 12 Mod.
313.

Then as to the meaning of the expression of the next *English* county, it is sufficiently explained in *Plowd.* 200. where the reason given for directing the *venire* to the sheriff of *Hereford* was, because the town of *Cardiff* was in the county of *Glamorgan* in *Wales*, where a *Sheriff of this kingdom of England cannot intermeddle*. From this reason it is manifest, that it must be the next *English* county where the king's writ of *venire* runs. That is the only way of accounting for the *Welsh* causes having always been tried in the next *English* county where the *venire* runs, and not in *Chester*, though in fact that is nearer to *Wales*.

Rule discharged.

And the *venire* awarded into the county of *Salop.*

(a) The *Maidstone* cases came before the Court in *Hil.* 13 G. 2. under the names of

Rex v. Weldish.

Rex v. Rand.

Rex v. Curteis.

These were informations in the nature of *quo warrantos* against the defendants, to shew cause

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cause by what title they exercised the office of Jurats of the *King's Town*, and parish of *Maidstone* in *Kent*: and the question was, whether there ought to be trials at bar?

It was objected against the trials at bar, by Mr. *Solicitor-General*, that there was no reason for it, either upon account of the length or difficulty of the trials, because there was but one single issue that was material, and that was upon a bye-law, which was a fact, the proof of which could not take up any great length of time. As to the other issues upon the election, swearing and admission, they were only consequential, and must attend the fate of the issue upon the bye-law.

E. contra, it was insisted, that the bye-law was pleaded as a bye-law, not extant in writing, which must depend upon usage, which usage must be proved by entries out of the books of the corporation.

That there was also another bye-law set out in the prosecutor's replication, though no issue was taken upon it, which would have very great weight upon the trial: and the proof of that would likewise depend upon a great variety of entries, in order to shew that it was under that bye-law and not under the bye-law alledged in the defendant's plea, that the common-council had exercised a power of electing jurats.

That the constitution of the corporation depended upon these trials, and that several points of law might arise in the course of them,

That,

That, in *Easter* term last, the defendants themselves consented to trials at bar, which the court would then have granted, but that the issues were not then joined. That the prosecutor had made an affidavit of all these facts.

Per Cur. let there be trials at bar.

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ESSAY V.

Of Repleaders.

*Whether upon an improper or immaterial issue,
a repleader shall be granted, or not.*

DEBT against lessee for years for rent. The defendant pleaded that *he* before the rent was due, for which the action was brought, had assigned the term to another, of which the plaintiff had *notice*: the plaintiff took issue upon the *notice*, and the verdict being for the defendant, it was moved by *Allen* for the plaintiff, that no judgment ought to be given, but a *repleader* awarded, because the issue was of an immaterial thing, for it is not the notice of an assignment of the term, without the agreement of the lessor, or acceptance of rent by him from the assignee, which discharges the lessee, but an agreement to this, or acceptance of rent from the assignee doth. And he cited *Nicholl's case*, 5 Co. Issue taken of *payment* upon a single bill (without acquittance) being found for the plaintiff, he shall have judgment: but if it had been found that defendant had paid, judgment should be arrested. And the difference he said is when the issue is found against the pleader, judgment shall be for the plaintiff; but if for him not. *Twisden, J.*—said, if an *improper* issue is taken and verdict given, judgment shall be given upon

Serjeant v.
Fairfax, E.
13 Car. 2. B. R.
1 Lev. 32.

To an action
of debt for rent,
defendant
pleads assign-
ment of the
term before
rent due, of
which plaintiff
had notice, who
takes issue upon
the notice.

V. post Jones
v. Bodiner.

upon it whether it be for the plaintiff or defendant, and cited 5 Cro. 575. But an *immaterial* issue is, where upon the verdict, the Court do not know for whom to give judgment, whether for the plaintiff, or for the defendant, as *Hob.* 175. And the *Chief Justice* and *Windham* agreed with him, and awarded a *repleader*, 2 Cro. 585. 3 Cro. 227, 228. and 2 Cro. 5.

Day and place made part of the issue.

Holbech v
Bennett, T. 23.
Car. 2. B. R.
2 Lev. 11. M.
ult. 670.

Plea in bar to
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verdict for
plaintiff.

Error of a judgment in replevin in C. B. where *Bennett* was plaintiff in the replevin for taking his cattle in *Fillingly Field* in *Fillingly*; and *Holbech* avowed for that the mayor, and commonalty, and divers other particular persons by name, were seised and by their indenture dated 11 *March* 1647, it was witnessed, that they demised to *Bennett* for twenty-one years, and by indenture 1st *May* in the 11th year of the new king, it was witnessed, that he assigned to *Holbech*, and that 1st *October* in the 11th year of the new king, *Holbech*, at *Fillingly*, demised to *Bennett*, rendring rent; and for rent in arrear he avowed; the plaintiff *Bennett* in bar said, that *Holbech* did not demise the said 1st *October*, at *Fillingly* afore-said, in manner and form as, &c. Upon which issue, and verdict for the plaintiff, that he did not demise, the said 1st *October*, at *Fillingly*, in manner and form as, &c. and upon this judgment for the plaintiff, and now error assigned that this was an immaterial issue, making the *day* and *place* of the demise part of the issue, for a demise at any other day, or place, had been sufficient to maintain the

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avowry, and they are only put for conformity in pleading, but the plea ought to have been general, that he did not demise, in manner and form as, &c. and the *day* and *place* ought to have been omitted out of the traverse, for they are not traversable, and if it had not been a fact, the avowant might have given in evidence a demise at another *day* and *place*, which had been sufficient for him to maintain his avowry for rent, of which he is now deprived, by the bad bar of the plaintiff, and the Court knows not for whom to give judgment, according to the right of the matter, and because this case is not remedied by the new statute, which cures defaults, where the right of the matter is tried; as was objected for the plaintiff that it is; and of such opinion was the Court, after the matter had been twice debated; but then it was doubted by the Court what should be done: for *per Hale*, Chief Justice, the Court cannot now award a repleader upon a writ of error, if they reverse the judgment, as was anciently done, for which he cited *Trin. 8 E. 2. Rot. 59. Trin. 11 E. 3. Rot. 75. Trin. 27 E. 3. Rot. 21. Hil. 33. E. 3. Rot. 79.* where this Court awarded a repleader upon a writ of error, after reversing of the judgment, as the court of C. B. ought to have done before judgment; for this he said had been disused above one hundred years, and it could not be put in practice now, upon which it was prayed on behalf of the avowant, to reverse the judgment, and leave the matter at large, but then *Hale*, Chief J. took two exceptions to the avowry; 1. It is said that the mayor and commonalty, and the feoffees, were seised, which is intended of a joint seisin, and a corporation and natural persons cannot be seised

VOL. III. D d jointly.

If B. R. reverse a judgment for mispleading, they cannot award a repleader.
Qu?

Plea of indenture by testatum existit not good.

jointly. 2. The assignments are not pleaded positively, but by a *testatum existit*, and then, if they reverse this judgment, perhaps they might give judgment for the plaintiff, upon his declaration, for the defect of the avowry. *Et adjournatur*; Saunders for the plaintiff, Levinz for the avowant.

Outlawry and process of execution thereon, pleaded to an action of trespass; replication, the lands where, &c. traversed, and verdict for QUER'.

Quere, if he shall have judgment on the verdict, or on the declaration and plea; or a repleader?

Jones v. Bodiner, T. 8 W. 3. B. R. Comb. 379.

Trespass for breaking his close and taking his cattle: the defendant pleads, that the plaintiff was outlawed, and a *capias utlagatum* issued, and an extent thereupon, and then a writ of *Levari. Hil. 7 W. & M.* reciting the outlawry, and commanding to levy from the day of the taking upon the extent; that this writ was delivered to the sheriff, who made a warrant, by virtue whereof the defendant took the cattle in those lands.

The plaintiff replies, that the defendant took them upon other lands of the plaintiff *absq' hoc*, that he took them upon those lands; whereupon issue was joined, and verdict *pro quer'*.

It was now debated by Sir Barth. Shower *pro quer'*, and Northy *pro defendente*, whether the plaintiff should have judgment upon the verdict or upon the declaration, and the defendant's confession of the trespass by his plea, or that there should be a repleader; for it was

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agreed on all hands, that the bar was ill, for there could be no such writ, *Hil. 7 W. & M.* (for the queen was then dead) and the issue seemed immaterial.

Sir *Barth. Shower pro quer'*, that where the plea contains matter of bar, though not a good bar, and issue is taken upon it is holpen by the verdict. 3 *Cro.* 228. *Lovelace and Grimsden*, 3 *Cro* 455. *Chamberlain and Nichols*. *Mo.* 692. *S. C.* where in debt upon a single bill, the defendant pleaded payment without an acquittance, yet issue being taken and found for the plaintiff, he had judgment. 3 *Cro.* 778. *Dighton v. Bartholomew*, in trespass and assault the defendant pleaded a concord, but without satisfaction; and after issue and verdict *pro quer'*, it was adjudged that it was helped by the statute. *Mo.* 867. *Tasler and Salter*. *Hob.* 326. *Reynolds versus Buckle*. *Raymond* 458. *Spatburst versus Overind*.

Northy agreed, the rule laid down by Sir *Barth. Shower*; but here is no matter of bar at all, because there could be no such writ.

Holt, C. J.—There might be a writ out of the exchequer; and if it had been well pleaded, it had been a good bar, sure it hath the countenance of a plea in bar. 2 *Cro.* 678. *Jones versus Ridler*, in ejectment, where the defendant pleaded an ill special plea (for sometimes they pleaded specially in those days) it was held he could not take any advantage of his own ill plea, but the plaintiff might if the verdict had been against him.

I take the case of *Reynolds*, *Hob.* 326. to be misprinted, for the entry is no bar. Expulsion makes the first part of the bar, and holding out the rest, the book saith it was found for the defendant, which could not be, the judge

The issue being immaterial, judgment was on the defendant's confession, and the verdict set aside.

Vide ante *Serjeant v. Fairfax*.

Hob. 326. denied.

must direct the jury otherwise. 3 Cro. 367. *Stokes* versus *Annesby*. In the case of *Tasker* and *Salter* the judgment was reversed.

And the Court inclined to give judgment for the plaintiff upon the verdict, but afterwards *Holt* cited 3 Cro. 214. *Lacy* versus *Reynolds*, and 2 Roll. 99. S. C. and the Court agreed, that the plaintiff should have judgment in this case upon the defendant's confession of the trespass, the issue being immaterial, so that the Jury could not give damages, but there must be a new writ of enquiry. *Per Holt*, 1 Cro. 25. *Knight* versus *Harvey* (though not clearly reported) is home to the purpose, only in that case being in debt, there needed no writ of enquiry. 22 E. 4. 46. a. (though before the stat. of jeofails) yet goes to the reason of the thing.

The verdict was set aside and judgment *pro quer'*.

Of an impertinent issue ; of repleaders in general ; of jeofails, defaults, and essoins, &c.

Staple v. Haydon, M. 2 Ann. B. R. 6 Mod. 1. The case.

Trespass, justification as to one trespass for a way. Replikation, defendant had a more convenient way, and issue.

Hob. 66.

The plaintiff *S.* brings trespass against *J. H.* and *G. Fowler*, for that they, on the 31st of *May*, in the thirteenth year of the late King *William*, broke his close called the *Wharf*, in *Stepney*, in *Middlesex*, and threw down a perch of rails therein standing : and also, for that on the 7th of *July* following, they entered into the same wharf, and committed the like trespass.

The defendant *G. F.* as to all, pleads Not guilty : but *J. H.* as to the trespass laid on the 31st of *May*, pleads Not guilty as to the force, and justifies the entry, and throwing down the rails ;

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rails; for that long before one *Edward G.* was possessed by virtue of a certain lease for eighty years then to come, and yet unexpired of the said wharf, and also of a yard next adjoining thereunto; and that for the necessary use of the said yard, he had and used a way over the said wharf to certain stairs on the river *Thames*, which was thereunto contiguous, there to take water, &c. and being so possessed, he, on such a day and year, which was prior to the time laid in the trespass, demised the said yard (*inter alia*) to the defendant *J. H.* for a term of years yet unexpired, with all lawful ways, &c. thereunto belonging: by virtue whereof he entered, and was possessed, &c. whereby he was intitled to the said way: that the plaintiff obstructed it with rails, so he coming to use it could not pass; and that he requested the plaintiff to open the rails, which he refused, so he justifies the throwing them down, and pleads directly in the same manner to the other trespass laid on the 7th of *July*, and avers, that at the several times he had no other way to the said stairs and river *Thames*, than by and through the said wharf.

Plaintiff, as to the plea to the first trespass, replies, that the defendant *J. H.* had another more convenient way to the river *Thames* than through the said wharf, and thereupon they are at issue; and upon the plea to the trespass on the 7th of *July*, he demurs, *ideo fiat jurat*, to try the issues, and assess contingent damages upon the demurrer. Both defendants make default at *nisi prius*; which being recorded, the inquest is awarded by default, and *G. Fowler* is found guilty of the trespass on the 31st of *May*, but acquitted of that on the 7th of *July*; and *J. H.* is acquitted of the trespass

Plea to the other trespass that he had no other way to, &c. demurrer and joinder.

Hob. 66.

on the 31st of *May* as to the force, but the Jury found as to the rest, that he had no other way to the said stairs and river *Thames* than through the said wharf, and assess damages upon the demurrer, and acquit him of the trespass on the 7th of *July*.

In this case several points were moved and resolved by the Court:

(1.)
If a repleader
ought to be in
this case.

R. Whether a repleader should be in this case, there being, as was said, an immaterial issue joined; and the Court held clearly the issue was *impertinent*, but as to repleaders generally.

When a re-
pleader shall be
upon an immat-
erial issue.

1. The Court held, That a repleader is to be awarded when such an issue is joined, as the Court after trial thereof cannot give a judgment, as being *impertinent*, and not determining the right.

2. That before the statute of *jeofails*, if such an issue were joined, the Court before trial might award a repleader.

Where the
amendment
must begin as
to repleader.

3. When a repleader is awarded, the amendment must begin where the plea which makes the issue bad begins to be faulty; and therefore if one makes himself a bad title in his declaration, to which there is a bad bar, and thereupon a bad replication on which there is issue, there the repleader must be awarded and entered on record; and plaintiff shall declare *de novo*, &c. But if the bar be good, or plea be good, and the replication bad, and issue thereupon, there a repleader will be only as to replication; but if bar and replication be bad, and a repleader awarded, it must be as to both. *Vid.* 3 *Keb.* 664.

Error.

4. If the Court award a repleader where it ought not to have been, or deny it when it ought to be, it is error.

5. That

5. That upon award of repleader, there must be no costs, because it is a judgment of the Court upon the pleading; but upon amendment of a plea in paper, there must be costs.

No costs on award of repleader.

6. That upon a general rule for repleader, without any direction from the Court from what they should begin the repleader, it must begin from the first fault which occasioned the bad pleading commenced, for the judgment is *quod partes replacitent*.

General rule of repleader.

7. That the pleadings in this case were such as a repleader would be awarded upon at the common law; for the defendant having insisted upon a title to a way by grant, his averment, that he had no other way, was immaterial, and by consequence the issue thereupon impertinent; besides there was no issue at all joined, for the plaintiff's affirmative does not meet with the defendant's negative.

Averment immaterial, and the issue impertinent.

8. That though a repleader should have been at common law in this case, this motion having been made before trial, and it being doubtful whether a verdict would not help it by the statute of *jeofails*, the Court said it would be just in them not to grant a repleader till after verdict; for they said they might indeed grant a repleader before verdict at common law, but they were not bound to do it. So note the diversity since the statute; for though it were reasonable to award a repleader before verdict at common law, where the pleading appeared such on which no judgment could be after verdict; yet since the statute, when verdict may cure immaterial or informal issues, it may not be proper to do it.

Repleader by common law, and when grantable.

Aid by statute law.

9. After the trial, the Court held, That this issue was such on which no judgment could

Vid. 2 Lev. 135. Acc. 2 Saund. 318, 319.

be; for defendant pleaded, that he had no other way to the stairs and river *Thames*. Plaintiff replies, that he had another way to the said stairs and river *Thames*; and Jury found no other way to the said stairs and river *Thames*, so in truth there was no issue joined.

10. That in this case there could be no repleader, for the parties were quite out of Court by the default.

(2)
Points agreed;
as to a way
claimed.

In reference to the way claimed, these points were agreed on by all:

1. That a man cannot claim a way over my ground from one part thereof to another; but from one part of his own ground to another, he may claim a way over my ground.

Vid. 2 Cr. 170.

2. A stranger may have a way over another's soil three manner of ways, *viz.* for *necessity*, by *grant*, and by *prescription*: for *necessity*, as if *A.* has an acre of ground surrounded by ground of *B.* *A.* for necessity has a way over a convenient part of *B.*'s ground to his own soil, as a necessary incident to his ground: so if *A.* grant a piece of land which is surrounded by land of vendor, he grants a way as a necessary incident therewith.

Way for necessity.

By grant.
2 Cr. 121, 122,
170.

3. If one be seised of *Black-acre* and *White-acre*, and uses a way over *White-acre* from *Black-acre* to a mill, river, &c. and he grants *Black-acre* to *B.* with all ways, easements, &c. the grantee shall have the same conveniency that grantor had when he had *Black-acre*: so if *A.* has two acres of land, and has a way from them over another's soil, and grants one of them with all ways, the grantee shall have the same way that grantor had: but there the grantee in making title must alledge such an estate in the grantor as is traversable, and not only

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only say, that the grantor was possessed of the place to which, &c. for a term of years, for there the possession would be traversable materially.

If a way of necessity be claimed, it is a good plea to say, the party has another way; but *secus* where a way is claimed by grant or prescription.

Prescription.

4. The way of pleading in this case had been to shew, that such a one was seised in fee of the place to which, &c. and being so seised was intitled to a way, and shew how, and that he granted to lessor, &c. who also granted it to him, &c. For when one shews a particular estate, he must settle the fee in somebody.

The way of pleading a particular estate.

5. It was agreed, that by grant of a house to which there is a way of necessity, without more, the grantee shall have the way as well as if it were specially mentioned in the grant. 2 Cr. 190.

A way of necessity.

It was resolved, that if the plaintiff had demurred to the defendant's plea, without doubt he should have had judgment.

(3)
If demurrer to plea.

Upon the point, Whether the matter were now cured after verdict by the statute of *jeofails*, these points were agreed:

(4)
If aided here by the stat.

1. If a jury find a point in issue, and a superfluous matter over and above, that shall not vitiate the verdict.

2. That in this case the Jury found nothing that was put in issue, for they do not find that either he had no other way, or had another way to the *Thames*; but that he had no other way to the stairs and *Thames*, which might well be, and yet he might have another way to the *Thames*.

As to defaults after issue, the Court took a diversity between a real and a personal action; for

(5)
As to defaults after issue, &c. in real actions.

for in a real action, if a tenant make default, the demandant may, if he please, waive the benefit of it, and proceed by further process against him; as if the tenant make default on the original, the demandant shall have a *grand cape*; and if the tenant do not save his default, the demandant, if he insists upon it, shall have judgment final upon the first default; but he may, if he please, release the default, and continue further process against him. In like manner of a default after appearance, the demandant shall have a *petit cape*, &c. and if the tenant do not save his default, he may have judgment upon the default; or if he will waive that advantage, he may, and proceed by further process. If in a real action the tenant make default at *nisi prius*, the default is never recorded, but only the *possea* marked; and the demandant, if he will, shall have a *petit cape*, and judgment thereupon if the default be not saved, or else he may waive the default, and continue with further process. But in case of a personal action, a default at the trial is always recorded, and there is no farther process in law to bring the defendant into Court upon release of the default. And anciently at every continuance-day the parties were demandable; and if the defendant did not appear, or were not essoined, his default was recorded, and judgment given against him thereupon: but by the statute of *Marlbridge, c. 13.* and *Westm. 2. c. 27.* after issue joined in a personal action, the defendant shall have but one essoin and one default; and if the default be upon the *venire fac'*, then it is recorded, and a *distringas* shall go against the *jur. ad triand'*, and against the defendant, to receive his judgment; but if he comes in at

the

Vid. 2 Cr. 36.

1 Vent. 60.

2 Saund. 45.

1 Jo. 412, 413.

1 Cro. 517.

Personal actions.

1 Cr. 511.

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the day of *nisi prius*, he saves his default; but if he does not, the default is peremptory, and final judgment shall be given thereupon. And it is to be observed, that this one effoin and one default that the statutes give, must be at the first continuance after the issue; for if the defendant should appear at the first continuance, viz. at the *venire fac'*, he shall neither be effoined, or have a default saved at return of the *distringas*, but judgment peremptory shall be given on such default. 2 *Inst.* 217.

Default peremptory.

If defendant imparl to a day in a personal action, and he does not appear at the day, judgment final shall be given against him; for the default is peremptory to him, and there is no process to bring him into Court again. *Vid.* 38 *H.* 6. 33. In debt the defendant pleads in abatement to the writ, to which the plaintiff imparls, and at the day given the defendant makes default: judgment final is upon the default, though the plea was only in abatement, 18 *E.* 4. 7. In trespass the defendant demurred, and made default at day given, and judgment final. In debt upon an obligation, defendant pleads a release, and after demurrer day is given, and default is made by the defendant at the day, judgment final shall be given: *Vid.* 1 *H.* 7. 11. In trespass defendant imparls, and makes default at the day, judgment final shall be given: so in debt, 11 *H.* 7. 5. and the case in 2 *Cr.* 357. was remembered, where a judgment in an inferior court was reversed for this error; that the defendant being effoined, and making default at the day given by effoins, they gave a further day when it should be a judgment by default.

Imparlanee and default in a personal action.

Abatement in debt.

Demurrer in trespass, &c.

Judgment final.

So now, what stuck with the Court was, whether

Whether here judgment

should be upon
the demurrer,
or upon the de-
fault.

whether judgment should be given upon the demurrer against the defendant, or upon the default; that is, whether he being out of court as to one issue by the default, he could be present in court as to the issue in law upon the demurrer, so that the Court might give judgment thereupon: and as to this point, the case was, a defendant in two several trespasses *pleads* an ill plea to one, on which plaintiff demurs, and joins issue upon the other, and makes default at the day of *nisi prius*; whereupon the inquest is taken by default as to the issue, and contingent damages upon the demurrer. And *Ward*, for plaintiff argued, that judgment ought to be upon the demurrer.

Diversity as to
defaults of the
defendants.

1. This is not such a default on which judgment can be given, and he took this diversity, that wherever in a real action the default is saveable, so that *grand* or *petit cape* shall go, there in a personal action a default is not peremptory, but there is indeed a proper process to issue, and bring the party into court. As for the purpose in a real action after imparlance *prece partium*, or upon effoin, if the party having chose his day fail thereupon, peremptory judgment shall be thereupon, and the lands seised; and in that case, judgment would be likewise peremptory in a personal action; but if the default were upon the return of a process, which is saveable in a real action, there judgment peremptory ought not to be in a personal action, because there the day is not taken or chosen by the party, but given to him by the court, and it seems but reasonable he should be more severely used upon his default at his own day, than at a *dies datus* by the Court.

As to default
of plaintiff, &c.

But this is only in reference to defendants;
but

but in case of plaintiffs, they are in many cases demandable at day given to pursue their writ: but in case of defendants, upon default at a day given before plea pleaded, there shall be no judgment peremptory. *Vid.* 7 H. 6. 19, 41. 19 H. 8. 6.

In trespass the defendant appears upon the exigent, and day is given over to another term, at which the defendant makes default, and *per Cur.* plaintiff can only have process *ad respond.* And if he fail thereat, then three *capias*'s and *exigent* as before; and he quored 20 Ed. 3. 12. 2 H. 4. 1. *pl.* 3. 2 H. 4. 4. 11 H. 4. 31, 32. 20 H. 6. 44. *Jud. Reg.* 1 a. b.

The writ of *ad audiend. judicium* was of great use then, though now altogether disused.

Breve ad audiendum judicium.

37 H. 6. 29. gives an account of it, that formerly, when a demurrer was joined in a real or personal action, this writ used to go to bring parties to hear judgment, but now the course is, that he attend at his peril. 4 H. 6. 29. That the defendant is not demandable on demurrer, but the plaintiff is only to appear and pray his judgment. Just as upon a writ of inquiry of damages, the defendant has no day in bank; and in *Common Pleas*, neither plaintiff nor defendant have a day given them, but plaintiff is to attend for his judgment. *Cro. El.* 75. 144.

But plaintiff has day by course of *K. B.* *Yel.* 97. 1 *Rol. Ab.* 486. Now here, though there be but one *ve. fa.* to try the issue, and inquire of the contingent damages, yet these are as two distinct matters, for anciently the course was not to put both together; but that is new, and for ease and dispatch, and here the

Here are two distinct matters in the *ve. fa.*

the jury might have been discharged of the issue, and yet enquire of the damages as an inquest of office. 16 *Ed.* 4. 1. 2 *Inst.* 440.

How, if judgment were to be upon the default.

2. He insisted on it, That if judgment were to be upon the default, it must have been given at the *nisi prius*, and that being not done, and the default being for the plaintiff's advantage, he might waive or release it, and quoted 42 *Ed.* 3. 1. and the defendant upon a writ of error can never take advantage of the matter. *Vid.* 2 *Saund.* 46.

Demurrer waived by default in a personal action.

Darnel contra. Wherever there is a demurrer in any personal action, and the defendant makes default at the day, the demurrer is waived. *F. Default*, 59. 38 *H.* 6. 33. In personal actions, if the parties are at issue or demurrer, and after defendant makes default, the judgment shall be upon the default, and the demurrer is waived. *Bro. Default*, 58. 39 *H.* 6. 16, and continued to 18. *Bro. Default*, 73. *Fitz. Jour.* 33. *Process*, 147. 45 *Ed.* 3. 3. And as to objection, That if judgment were to be given on the default, it should have been immediately. *Answer*, All the judges of *nisi prius* could do, was to record the default.

When inquest may be taken by default, before count, or after, &c.

POWELL, *Justice*.—I do not find but the parties are demandable, both in case of day given upon demurrer, and upon issue joined; but after issue, inquest may be taken by default. But in debt, suppose the defendant comes in upon the *exigent*, and the plaintiff, as he may, prays a day; there it being a day had on prayer of the plaintiff before count, if defendant make default, process shall go to bring him in; but if the plaintiff had counted, and before issue the defendant had made default, if plaintiff will demand him, he may

have

have judgment upon the default; and I take it to be the same upon demurrer where day is given at which defendant makes default, for there judgment final shall be, and no process *ad audiend' judic'*. *vid.* 18 *Ed.* 4. 7. And the book of 20 *H.* 6. 44. is mistaken by *Fitz.* for the book is full, that judgment must be upon the default. 44 *Ed.* 3. 1. After demurrer in personal action, that process should go *ad audiend' judic'*; but before demurrer or issue joined, if day be given after pleading, a default will be peremptory, and judgment final upon default, but the usage now is not to demand them. Modern usage.

It is very hard to make a default at a day given by court on demurrer, peremptory; but here is an issue as to part, and a demurrer as to the other part, and a *ve. fa.* to try the issue, and inquire of damages. And day is given with a *nisi prius*, which day of *nisi prius* is in truth but to try the issue, and inquire of damages, but the day on demurrer is *ad audiend' judic'*; so that in truth the day given *ad triand. exit'*, &c. has nothing to do with the day of demurrer, and it is not necessary that the defendant should have a day on the writ of inquiry; so that the day *ad audiend' judic'*, in this case, is the day in bank, and the default at *nisi prius* is only to that for which defendant had a day there, that is, to try the issue, and the taking the inquest by default is a waiver of taking advantage of judgment by default.

Nor do I know where plaintiff may, in a personal action, take advantage of a default upon the inquest; but where the defendant pleads a release or acquittance, and at issue makes default, there indeed he may pray judgment

Quod Holt
concessit.

ment upon the default; or that inquest be taken by default; but after he takes inquest by default, he is too late to pray judgment by default, for his taking the inquest is a waiver of the judgment by default, and judgment must be upon the verdict, and not upon the default, that being waived by prayer of inquest. Upon an issue of *non est factum*, you cannot take a judgment by default.

HOLT.—The question first is, Whether if default be in a personal action after declaration, and day given over, either by imparlance or any other day; whether, I say, this be so peremptory that judgment final ought to be upon that default; and I think in case of imparlance, whether to a day in the same term, or another, judgment final ought to be. 18 Ed. 4. 7. 36 H. 6. 19. and 19 H. 6. are full in the point, without taking any difference.

Two defaults
in action real,
and but one in
action personal.

Now then upon demurrer, because parties are at issue in judgment of court, suppose it had been in real action, and *Cur' adv' vult*; defendant makes default, *petit cape* must go, and he does not save his default, shall not judgment final be given upon the default? If it be so when there is a demurrer in a real action, is it not much stronger in demurrer in a personal action? And it is not less peremptory upon demurrer than imparlance; for if default be after demurrer on day given in same term, it is peremptory; that is, if party does not come at such day in the same term, it is a departure in despite of the court; and there in real action, no *petit cape* shall go, but judgment final shall be on the demurrer, and not upon the default; so that, if the book of H. 6. be law, as sure it is, judgment is as much to be given upon default in personal actions, as in

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in real, only that there must be two defaults in a real action, and but one in a personal one.

19 H. 8. 16. If party comes in upon process in personal action, or upon *cepi corpus*, or *exigent*, and day is given *prece partium*, that is, by consent of parties, at which day default is made, no judgment can be given. Why? Because there is no declaration. But if it were after declaration, and at a day default had been, it were peremptory. So is the case of 7 H. 6. 19. 41. one in custody of marshal upon a *premunire*, is charged by bill in nature of an appeal of *Mayhem*, and day is by consent of parties, at which there is a default: there cannot be judgment final, because though he had been charged in custody of the marshal, yet he never had been in court; but if the default there had been upon an imparlance, it had been peremptory, and final judgment had been thereupon. Indeed, in annuity, which, though personal, yet partakes of the nature of a real action, for there is final judgment given to recover an inheritance, and the process in annuity therefore imitates that of a real action, after default there shall be a *distringas ad audiend' judic'* to afford the defendant an opportunity to save his default, because though the recovery shall charge the person only, yet it may be of an inheritance. So in a *seffa ad molendinum* if defendant make default, there shall be a *distringas* to give him liberty to save his default, for that also follows the nature of a real action, as being of freehold or inheritance. F. N. B. 123. D.

ay, but this is like an inquiry of damages.

1. If judgment be against a defendant, and an inquiry of damages, he has no day given him thereupon,

Where day is given, prece partium, before declaration, &c.

7 H. 6. 19. 41.

Appeal.

Annuity.

Secta ad molendinum.

Diversity where only inquiry of damages, and where both if-

sue and de-
murrer.

thereupon, and therefore he can make no default; for the Court have already given their judgment against him, and he thereby is quite out of court, and the inquiry is only to ascertain the damages. But where there is both issue and demurrer, and before judgment on the demurrer a *ve. fa.* goes to try issue, and inquire of damages, whereupon defendant has day, on which he makes default; is not that a default to the day of demurrer, as well as of issue? For though they be in truth different, *viz.* one the day of *nisi prius*, and the other the day in bank, yet in consideration of law they are the same. If there be two defendants who plead severally, one of them demurs, and judgment is given against him, before issue joined with the other, then he against whom the judgment passed has no day in court, yet the plaintiff may continue process against the other; but if in that case the issue were to be tried before judgment, then the defendant who demurred has a day, and that is the same that the other has by the *nisi prius*, which by law is the same with the day in bank. A default in real action at the day of *nisi prius* is the same as a day in bank, and as fatal, for they are not to be severed. And why not so in a personal action, and it is incident to the trial of the issue, to inquire of the damages upon the other issue in law. So if the day of *nisi prius* be the same with the day in bank, the two have the same day; but here, though it be one defendant, yet you would have him be out of court as to issue, by reason of default at *nisi prius*, and in court upon the demurrer in the day in bank; that is, in and out of court the same day.

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If there be default after demurrer joined, judgment shall be upon the default, or upon the demurrer; and when continuance is given, the appearance of both parties are entered at the continuance day, and anciently they used to demand the parties; so then they lay at lurch for one another, but now these are things of course.

Judgment upon default after demurrer joined, &c.

And whereas my brother *Powell* affirms, that there can be no day on the demurrer but the day in bank: I would suppose there are two defendants, one pleads to demurrer, and the other pleads to issue, and *ve. fa.* goes to try issue, and inquire of contingent damages; before the day of *nisi prius* and *puis darrein continuance*, a release is made by plaintiff to the defendant that demurred; can he plead it at *nisi prius*? And if he fails in doing it, can he plead it in bank at day there? And *Powell* *sub:to* allowed he might plead it at *nisi prius*, but not in bank; but after seemed to doubt, whether after demurrer a plea *puis darrein continuance* could be pleaded.

Vid. Hob. 31.

If at a day given upon a writ of error defendant makes default, the writ of error may go on, and the judgment be affirmed, because it is no new judgment that is given for the defendant, who is now out of court by his default, but only his former judgment affirmed and ratified; but in that case it were hard to give the defendant costs upon the statute: so if a defendant make default, plaintiff may have judgment; for a man that is out of court may have a judgment given against him, though not for him: And he wished the defendant's counsel to take care how they made default; for after default, though plaintiff could not prove his declaration, so as verdict

A man out of court may have judgment against him, though not for him.

would be for him; yet it were very hard to give him a judgment, for he was out of court.

At another day another point moved in this case, was, whether judgment might not be given against the defendant upon the issue, though looked upon as immaterial, and a *jeofail*? Because the defendant confessed the trespass in his plea, and made no good justification: so (as was urged) judgment ought to be given against him by confession. And hereupon Ch. J. *Holt* took diversity, if one confesses the cause of action, but pleads matter, which, if well pleaded, would bar the plaintiff, there it were hard to hold the defendant to such confession, and give judgment against him, as here the defendant indeed confesses the trespass, but offers such matter as if true and well pleaded would justify him: but where the fact is confessed, and such matter of justification offered, which though never so true, and well pleaded, would not bar the plaintiff, there judgment may be upon the confession, as in an action for words, for calling plaintiff a thief. Defendant justifies, for that the plaintiff received a thief, and pleads it ill; there judgment may be upon the confession, for that matter could not have been so pleaded, as to have justified the words.

In the further debate of this case, the court held, that if there be two defendants who sever in pleas, and one is found guilty, and an issue not helped by the statute of *jeofails* is tried for the other, who having made default is out of court, so as there can be no repleader, and of consequence the judgment must be to quash the writ or bill, it necessarily shall be abated thereby as to the other; for though one de-

If defendant confesses the trespass, but offers good matter of bar, if well pleaded. Vid. Hob. 69.

Hard to hold the defendant to his confession.

Aliter, Where the matter confessed would not bar the plaintiff.

Two defendants sever in pleas, &c. so as there can be no repleader.

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fendant may be acquitted in part, and condemned in part of a trespass, or one of two condemned, and the other acquitted, yet the writ cannot abate as to one, and subsist as to the other; and as to trespass against two, when the acquittal or discharge of one shall discharge the other. *Vid. 2. Cr. 134.* Trespass against two for taking gun and dagger; one justifies the taking in his own defence, being assaulted by plaintiff; the other pleads not guilty, and is found guilty, and damages against him, and the other issue is found for the defendant, there judgment shall be against him that is found guilty; for the other's plea does not destroy the plaintiff's title for good and all: but if trespass be against two for taking the plaintiff's goods, and one pleads not guilty, and is found guilty, and the other justifies the taking by gift, &c. and his plea is found true, there for as much as the defendant's plea entirely destroyed the plaintiff's cause of action, he shall have judgment against neither.

But the last day of *Hilary term* following, the whole Court declared, That they were of opinion, that the issue was helped by the statute of *jeofails*, and for so much gave judgment for the defendant, and as to the demurrer, gave judgment for the plaintiff, without any reason. *Vid. 2 Saund. 318, 319.*

When the acquittal of one trespasser shall discharge the other.

Hob. 54.
Wherethe plea of one of the defendants entirely destroys the plaintiff's action.

Per Cur. This issue helped by statute of jeofails.

In replevin, plea in bar, with an absq. hoc. replication to an issue, demurrer to the replication, and concludes in abatement. Judgment final in C. B. for the plaintiff. Qu. If repleader can be upon demurrer. Of a plea in bar concluding in abatement. Of matter of abatement, and concluding in bar.

Crosse v. Bil-
son, Hil. 2 Ann.
B. R. 6 Mod.
102.
Error in B. R.

Replevin for taking his mare in *quodam loco*, called *The King's Highway*. The defendant *cognovit captionem*, damage fasant, in *quodam loco*, called *The Queen's Highway*, as bailiff to the Lord L. whose freehold the place where, is. *Absque hoc*, That he took *equam pred' in pred' loco*, called *The King's Highway*; *pro ut* the plaintiff *adversus eum narravit*, & *hoc paratus est verificare, unde petit judicium & return'*, &c. Plaintiff comes and says, *Quod cognoscere non debet, quia dicit quod dicto tempore quo, &c. cepit equam pred' in pred' loco tunc*, called *The King's Highway*, *modo & forma pro ut pred' plaint' allegavit*, and *hoc petit quod inquiratur per patriam*. The defendant demurs, and concludes, *Unde (ut prius) petit judicium, & quod narratio' pred' cassetur*: judgment final in *Com' Banc'* for plaintiff, and affirmed here upon error.

HOLT, Ch. Just.—The whole point of the case, take it the strongest that can be, is, after a plea in bar, and a replication, the defendant demurs to the replication, and concludes in abatement, and sure there judgment final ought to be given; and they all agreed, that all the matter of conusance in the plea was waived by the *absque hoc*; and the conusance in a different place from where the declaration lays the taking, is in truth matter only proper in abatement;

1. That all the matter of conusance is waived by the *absque hoc*, &c.

abatement; but the conclusion turning it into an avowry, makes it a plea in bar, as all avowries are, and final judgment is always given upon them, if they go for the avowant. They also agreed, that where matter in abatement is pleaded in bar, and concluded in bar, judgment final ought to be given.

2. That where matter of abatement is pleaded in bar, &c. judgment final ought to be.

But it was objected, That the demurrer being ill concluded, *viz.* in abatement, and contrary to the bar, it was to be looked upon as if there were no conclusion at all, and it would be a discontinuance, and judgment ought to be by *nil dicit*.

To which the Court answered, That the conclusion to the demurrer was, *unde petit judicium (ut prius)* and that is well enough, and according to the conclusion of the plea in bar, and the subsequent words, *Et quod narr' cassetur*, being inconsistent, shall be rejected.

So *per tot' Cur'* the judgment was affirmed.

Judgment affirmed. If a replender can be upon a demurrer.

Note, here *Powell* positively said; That replender could never be upon demurrer, but is always after issue; though the old books seemed to make a question of it, yet there were twenty authorities in the new books of it: and yet *Brotherick* seemed as earnest of a contrary opinion at the bar, *tacente Holt, Ch. Just. & Cur' reliquâ*.

Note, In the debate of this case at the bar, it was agreed, That the matter of this plea was matter in abatement, *viz.* a variance in the places.

That in this case the matter was abatement, *viz.* a variance.

2. That in replevin the defendant is both actor and defendant. As defendant, he may abate the plaintiff's writ, and that were vain for him to do if he could not have a return, and therefore he must proceed from his plea in abatement to make consuance; for his action

being a claim of right to distrain, he ought to make title to it against the plaintiff in the replevin who claims property in the distress.

Where defendant claims property.

Yet this rule would be explained; if defendant in replevin claim property in himself, he shall have return without consufance, because his plea destroys the plaintiff's title: so if he lays property in a stranger, and make no consufance, if that matter be admitted by the plaintiff, there shall be a return without consufance; for in that case by the admittance, the plaintiff's property is destroyed. But in all pleas that do not shew the property out of the plaintiff, there must be a consufance made, and the plea is what only is answerable, and not the consufance, for to traverse that would be a discontinuance, 8 *Ed.* 4. 41 b. *Cro. El.* 372. *Mic.* 2. *W. and M. in B. R. Hall versus Foot.*

Vid. 2 *Lev.* 92.
1 *Vent.* 127.
3 *Cro.* 896.
2 *Cro.* 519.

If plea be in bar, and concludes in abatement.

If a man plead matter in bar, and conclude in abatement, it shall be taken for a plea in bar from the nature and reason of the thing; for the plaintiff can have no writ, if he has not a cause of action, and therefore the Court will take the plea in bar. 37 *H.* 6. 24 a. 36 *H.* 6. 24.

Vid. 1 *Vent.* 136.

If the plea be matter of abatement and concludes in bar.

If one pleads matter of abatement, and concludes in bar, *et petit judicium si pl. actionem habere debet*, though he begin in abatement, and the matter be also in abatement, yet the conclusion being in bar, makes it a bar; and the reason is, because you admit the writ by concluding specially against the action, 18 *H.* 6. 27. 32 *H.* 6. 17 b. 36 *H.* 6. 18. 22 *H.* 6. 53 b.

How the defendant in replevin may take advantage of a variance.

And here *Holt, Ch. J.* said, That in replevin, if the defendant will take advantage of a variance in the place where the taking is laid, from that in which really it was, he must plead it in

in abatement, and begin either *petit judicium de breve*, or *de narr' quia dicit*, the cattle were taken in such a place, *absque hoc*, that they were taken in the place in the declaration. Then indeed he comes, *et pro return' habendo* distinctly; he says, he avows the taking in the place mentioned in the inducement of his traverse, damage *fesant*, or for rent, &c. To which no answer is to be given, but all is to depend on the plea in abatement; and it is a proper conclusion in replevin to say, *nude petit judicium & return' averior'*, without saying any thing of damages, for they are given by the statute.

Conclusion.

In quo warranto, as to a supposed mis-direction of the judge, that defendant could not prove a mode of swearing, contrary to what he had set forth in the record; the merits might be with the defendant, but his plea wrong, Court gave leave to move to set aside the verdict, and that a repleader should be awarded, one of the issues joined, and verdict, being impertinent and void, other issues were found for the King (as well as this) but without evidence.—After long argument on the doctrine of repleader, all the verdicts set aside, and defendant had leave to amend his plea, whereon the immaterial issue was taken, on payment of common costs.

The defendant had pleaded to an information in nature of a *quo warranto* exhibited against him “to shew by what authority he “acted as a mayor of this borough,” a title of election and swearing under a MANDAMUS pursuant to 11 G. 1. c. 4. but the *swearing* was (by mistake) set forth to have been in the same manner as it ought to have been in case the

Monday, 9th
May 1757.

Rex v. Roger
Phillips, mayor
of Carmarthen,
E. 30 G. 2.
1 Burr. 202.

The defend-
ant elected
mayor, and
sworn under a
mandamus: by

mistake alledged
swearing as
if upon a charter-
day.

the election had been upon the CHARTER-day.

Upon the replication, no less than fourteen issues were joined: which went down to be tried before Ld. Ch. Baron *Parker*, as Judge of *nisi prius*. But one of the issues (the 9th) was taken upon the *swearing* thus (erroneously) alledged to be before such persons as were only proper to preside UPON the CHARTER-DAY; (*just as if it had in fact been an election under THE CHARTER*); which was a mere *mistake* in the defendant's plea; for his *REAL swearing* in fact was *right*, viz. AGREEABLE to the *directions* of 11 G. 1. concerning the manner of being sworn under and pursuant to a writ of *mandamus*. The plea was worded thus, as to his being sworn in, viz. "That after the defendant had been so
" elected and chosen to be mayor, &c. and
" before he took upon himself to execute the
" said office, to wit, *at that same meeting and*
" *assembly so holden* upon the said *Friday*, the
" said 30th day of *May* in the 28th year
" aforesaid in manner aforesaid, he the said
" *Roger Phillips*, IMMEDIATELY after his said
" election, did *then and there*, ACCORDING TO
" the DIRECTIONS of the LETTERS PATENT of
" the said late King *HENRY the 8th*, TAKE his
" *corporal oath*, upon the holy Evangelists of
" God," BEFORE *John Evans* MERCHANT,
George Jenkins, *Daniel James*, *William Sears*,
Lazarus Thomas, *Samuel Morgan*, *John Evans*
CARPENTER, *John Evans* CURRIER, *Richard*
Leigh, *George Bayle*, *Thomas Richard*, and
Lewis Philipp, then and there being TWELVE
discreet and honest men of the BURGESSES of the
said county-burrough, rightly, well, and faithfully to execute the said office of mayor of
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the said county-burrough, in all things touching and concerning the said office; they the said *John Evans merchant, G. J. D. J. W. S. L. T. S. M. J. E. c. J. E. c. R. L. G. B. T. R. and L. P. then being TWELVE discreet and honest men of the BURGESSES* of the said county-burrough, then and there APPOINTED ACCORDING to the DIRECTIONS of the said LETTERS PATENT last before mentioned, by the said then common-council of the said county-burrough, BEFOREWHOM the said *Roger Phillips*, so elected and chosen mayor of the said county-burrough as aforesaid, WAS to TAKE his said OATH: and that he the said *Roger Phillips* was THEREUPON, then and there, in due manner, admitted into the said office of mayor of the said county-borough.

BY VIRTUE WHEREOF he the said *Roger Phillips*, on the same Friday the said 30th day of May in the 28th year aforesaid, and from thence continually afterwards, for, &c. was mayor, &c. And by THAT warrant, he the said *Roger Phillips*, on, &c. and from, &c. until, &c. did "there use and exercise the said office of mayor, &c. and for and during all the said time, did there claim, &c."

The Lord Chief Baron, who tried the cause, reported that he was of opinion, upon the trial, "That upon the 9th issue, the defendant could not give evidence of a different swearing from what he had alledged upon the record;" and "That upon the 10th issue" (taken upon the allegation of being by virtue thereof mayor, &c.) "he could not vary from the title before set out, by virtue whereof he claimed to be mayor." And he had directed the Jury to find for the King: and they found a verdict accordingly. And he also reported "That no evidence

" evidence was entered into, upon *any* of the
 " issues; and that verdicts were found for the
 " King upon *all* of them: but that this was
 " agreed to be *without prejudice* in any future
 " trial."

Mr. Norton, Mr. Morton, and Mr. Price—
 for the defendant, had thereupon moved for
 and obtained a rule for the prosecutors (who
 had thus gotten a verdict) to shew cause
 " why there should not be a *new trial*;" upon
 an insinuation " that the Judge who tried the
 " cause, had *mis-directed* the Jury:" which
mis-discretion consisted, as they alledged, in
 this—viz. " that the Judge had precluded
 " the defendant from giving any evidence to
 " prove his swearing, as *set forth* in the said
 " 9th issue; the Judge apprehending, and so
 " directing the Jury, that it could be of *no*
 " kind of service to the defendant, to be ad-
 " mitted to prove an issue, which if *proved* or
 " even admitted, could NOT at all tend to make
 " out his right;" for that if this swearing as
 UNDER a CHARTER-ELECTION were to be ad-
 mitted, yet still it would not appear in ANY
 part of the record, that HE was regularly sworn
 UNDER a MANDAMUS election; which was the
species of election under which he claimed.

Sir Richard Loyd, Mr. Serjeant Poole, and
 Mr. Aston were prepared as they said, to shew
 cause, by convincing the Court, " that the di-
 " rection of the Judge was RIGHT; and con-
 " sequently that the verdict ought to stand."

LORD MANSFIELD.—The direction of the
 Judge was certainly *right*: therefore, if you
 should prevail in this application for a new
 trial, it could be of no service: for, AS *the re-
 cord stands*, the same direction must be given
 again.

Yet

Yet I am very desirous to *cure* this slip, if possible: for the *merits* have *never been tried*.

Consider whether the verdict may not be set aside; and the parties admitted to *plead* AGAIN.

The rule was enlarged; with this *addition*, viz. to shew cause "why the verdict should not be set aside, AND a *repleader* awarded."

Mr. Serjeant *Poole*, for the prosecutor, now shewed cause against setting aside the verdict and awarding a repleader. And he alledged that, though there should be a repleader awarded, yet the *whole record* must nevertheless *stand* as it is at present.

As to repleaders in general, he cited 6 *Mod.* Vide ante.
1. The case of *Staple v. Haydon* (1st resolution): it can only be on such an impertinent issue, as that the court can give *no* judgment upon.

Mr. *Norton*, Mr. *Morton*, and Mr. *Price*, *contra*, for the defendant—the issues are not all found against us, *absolutely*; but *without prejudice* to any future dispute, except as to the 10th issue.

Mr. *Norton*, Mr. *Morton*, and Mr. *Price*, stated the mistake: which they said was thus, viz. the defence set up was "An *election* of the defendant under a *mandamus*, issued pursuant to 11 G. 1." And in setting out his oath of office, he avers it to have *been* DULY taken; and shews it to be an *oath*, taken by him upon *this election*, and sets out the *right and proper oath of office*; but the plea 'tis true, goes on (following, by mistake, a precedent of a plea of an oath of office taken under an election upon the proper *charter-day*) and alledges it to be a swearing *at the same meeting so bolden*, &c. BEFORE *persons* who were only proper to preside

preside upon the CHARTER-day; viz. (BEFORE twelve burgessees, &c)

Which swearing, *before these improper persons*, they urged to be totally *immaterial*: and that, for the sake of attaining justice, it ought to be *some* how or other set right; the TRUE question having *never been tried*, viz. "Whether he took the oath of office, agreeably to " *the DIRECTIONS OF 11 G. 1.*"

Therefore it shall either be *amended*, OR a *repleader awarded*: for upon the present record, there is *no* justification *at all*; and therefore the issue joined is *totally immaterial*. The case of *Staple v. Haydon*, 6 Mod. 1. is almost in point. 1 *Ld. Raym.* 707. S. C. [1 *Salk.* 173, 216. S. C.]

This is a good plea in *substance*; but ill pleaded in point of *form*.

They *ought to have* DEMURRED to this part of the plea; and *not* to have taken *issue* upon it; for it is a matter of *law*, "Whether the taking *this* oath would have justified the " defendant:" and a verdict cannot make that good, which the Court sees cannot be in law. Therefore this verdict is utterly *void*: just like that in *Hobart*, 112. *Taske v. Salter*.

And such repleaders, in informations, are no novelties; for in 1 *Ventris*, 122. the case of *Reynell v. Heale**; a repleader was awarded, because the issue was mis-joined.

* N. B. This was a *qui tam* information at least; if not a *qui tam* action: the book is inconsistent with itself; but the title of the cause shews that it was an action.

And they *offered to pay costs*, in order to have this matter set right; and insisted that this is but just and reasonable; especially, as many *other* persons rights depend upon the right of this mayor.

They also cited *Cro. Eliz.* 245. the case of *Love v. Wotton*—where a repleader was awarded after verdict; the defendant having mis-

pleaded the statute. The reason of awarding the repleader there, must be "because the *true merits had never been tried.*"

They even urged farther, that it might well be taken, upon the face of the record, "that *he was sworn before the proper persons:*" it being alledged "that it was at the *SAME* meeting then and there so holden."

But they insisted that at most, this is *only form.*

As to repleaders in general—they cited 1 Sir J. S. 394. the case of *Rex v. Philips*, mayor of *Badmyn*, where the defendant's title was *clearly defective*, and confessed an usurpation; and therefore, as the *merits appeared* to be against the defendant, the repleader was not indeed there granted: but the general position seems to be, "that it *might, otherwise*, have *been granted.*"

Mr. Serjeant *Poole*, Sir *Richard Lloyd*, Mr. *Aston*, and Mr. *Nares pro rege*—argued that it is needless to grant a repleader, where there is *sufficient* appearing upon the record, whereupon to give judgment *against* the party, *exclusive* of the part which is pretended to be immaterial.

Nor shall a repleader be awarded, where the defendant has set forth a *defective title.*

Now certainly this is a *defective title*: he appears to be sworn before *improper* persons: and does *not at all* appear to *have been* ever sworn before the *proper* ones.

This is *not* a mere *defective* MANNER OF PLEADING; like *Cro. Jac.* 434. the case of *Holms v. Broket*—where issue was joined on a plea of payment *before* the day; or *Hob.* 112. the case of *Tasler v. Salter*; where the issue (upon *the way*) was in effect no issue at all.

But

V. ante.

But this is absolutely a *defective* TITLE; a swearing before improper persons: and is like 6 *Mod.* 1. the case of *Staple v. Haydon*. And they cited *Cro. Eliz.* 214. the case of *Lacy v. Reynolds*; where, though the issue was immaterial, yet, the plea confessing the words, the court gave judgment as upon a confession. So

V. ante.

Carthew, 371, the case of *Jones v. Bodinner*; and 1 *Salk.* 173. S. C. a like resolution. So, 1 *Ld. Raym.* 390. the case of *Pitts v. Polehampton*.

V. ante Es-
say II. IX. (3.)

But if a replender should be granted as to THIS issue, yet *enough* (besides this) will stand upon this record, to intitle us to judgment for the king.

Repleaders are never awarded for the sake of *parties*; but for the *sake of the COURT*.

And this is the reason why there are *no costs* upon repleaders: as appears by 2 *Salk.* TITLE REPLEADER. [FO. 579. which is an abridgment of the case of *Staple v. Haydon* in 6 *Mod.* 1. and 1 *Ld. Raym.* 707].

Nor shall repleaders ever be awarded, where *sufficient appears upon the record, whereupon* the court can give judgment. They shall not be awarded, ONLY because the party has *MISTAKEN his case*: they shall never be awarded, but where the issue is so *immaterial* that the court cannot tell how to give judgment.

V. ante.

In the case of *Serjeant v. Fairfax*, in 1 *Lev.* 32. it is laid down by *Twylden*, and agreed by the Ch. Justice and *Wyndbam*, that "An immaterial issue is, where, upon the verdict, the court can not know for whom to give judgment; whether for the plaintiff, or for the defendant."

It depends upon the plea pleaded; not upon the real merits: for though the issue be im-

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proper, yet judgment shall be given; as is expressly laid down in the same case of *Serjeant v. Fairfax*—1 *Lev.* 32. “If an IMPROPER issue is taken, and verdict given thereon, judgment shall be given thereupon; be it for the plaintiff, or for the defendant.” *Cro. Jac.* 288. the case of *Tampion v. Newson*, and *Bridget his wife*: the plea of the feme without the baron was no plea at all, nor confessed any thing. In *Bro. Repleader* 55. it did not appear how much the executors had; who pleaded “*riens inter maines*,” which was found against them. *Cro. Eliz.* 245. the case of *Love v. Wotton* (where the statute of usury was misrecited) was a case where *no judgment could be given*: for the court was bound to know the statute; and that there was no such statute as was pleaded, which was a statute made the *sixth of February*.

In the present case here is NO FAULT in the pleadings: therefore, where shall the repleader begin? This case is NOT the subject-matter of a repleader: this is only a DEFECTIVE TITLE.

It would be an ERROR, to grant a repleader, where the court *can* give judgment upon the pleadings already before them.

Now here, the defendant who claims to be mayor has NOT shewn “that he was sworn before the proper persons:” and the Court cannot presume it. He is asked, “*quo warranto*,” he acted as mayor: and his defence is *this*, “by a proper election and (*improper*) swearing;” and that “*Eo warranto*,” he acted as mayor.

But this plainly appears to the Court to be no warrant at all: therefore, the Court must give judgment *against* him.

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And

And the Chief Baron certainly determined right; for a man cannot plead *one* case, and then prove *another*.

Hob. 112. The case of *Tasker v. Salter* is not like this case. *This* is a *fact*, on which the Jury have judged.

And surely it does not follow, nor can it be taken upon the face of this record, that because he was sworn *at THAT ASSEMBLY*, he must therefore be sworn before the *proper PERSONS*. On the contrary, it is most manifest that He has *not* set out a *complete title* to exercise the franchise: and therefore the Court must give judgment against him.

The *other* issues were *never proved*; and even this bad title, set up by this issue, is found *false*; viz. "That he was *NOT* so sworn in, as " he has pleaded."

And judgment shall be given against the defendant even upon an issue misjoined, if found *FOR the plaintiff*, *Cro. Eliz. 778.* the case of *Dighton v. Bartholomew*, *5 Co. Rep. 43.* *Nicholl's case*, *Cro. Jac. 377.* the case of *Edward Maria Wingfield v. Bell*, *2 H. 7. 11. b. Rex v. Herle*; which case proves that if a man sets up a right, *different* from his true title, it shall be against him; and he shall *not* set up *another* title, *afterwards*.

The Court may here give judgment as upon a confession, when the issue is immaterial, and the mistake not amendable: and there shall in such case be no replender. *Carthew*, *371.* the case of *Jones v. Bodinner*, expressly, *5 Mod. 226, 227. S. C. Cro. Jac. 678.* the case of *Johns v. Ridler*; where though the issue was immaterial, yet being found *for the plaintiff*, it was adjudged for him, upon the defendant's confessing of the ejecting.

V. ante.

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In the case of *Love v. Wotton*, *Cro. Eliz.* 245. the court *could not* give a complete judgment.

Cro. Car. 25. The case of *Knight v. Harvy*, administrator of *Harvy*, *M. i. C. i.* (where the defendant pleaded an impossible judgment, and *riens en ses maines*, but only to satisfy it; and the plaintiff replying, the issue was found for the plaintiff, and he had judgment) is a case parallel to the present: for as the judgment there pleaded was a bad judgment, so this is certainly a *BAD swearing in*: therefore, the Court will here give judgment upon the *information*; as they did upon the plaintiff's declaration there, notwithstanding that impossible issue being found, it being found for the plaintiff.

Here *both* the election AND swearing in, ought to have been well pleaded; neither is a defence, of itself, alone. And the Court cannot take notice of the *fact*, *otherwise than* as it has been *pleaded*.

Therefore judgment may be given, as upon a confession, in the present case: for the defendant *shews no right at all*, to act as mayor.

So that, upon the whole, judgment ought to be entered for the King, *upon the face* of this record: to prove which, they cited 2 *Strange* 873. the case of *Broome v. Rice et al* in *C. B.* as in point: where, though the justification confessed the cause of action, in effect, yet the plaintiff replying "*de injuria sua propriâ absq'*" "*tali causa*," issue was thereon joined, and found for the defendant; but the verdict was set aside; and judgment ordered to be entered for the plaintiff, and a writ of inquiry of damages to issue.

Mr. Norton, in reply.—The SUBSTANTIAL part of this plea, is the “being sworn at this assembly immediately after the election: and the PERSONS before whom the swearing is alleged to have been,” may be considered as *surplusage*. If so, we ought to have been let in, at *nisi prius*, to prove our plea: if it is not so to be taken, we ought now to be let in, either to *amend*, or to *replead*.

This would plainly be a good bar, if well pleaded; therefore the Court will, for the sake of justice, grant a repleader.

The title set up by the defendant, is an election under a *mandamus*; and the defendant has accordingly stated an election made pursuant to the directions of the 11 G. 1. and a swearing-in pursuant to it: but he goes on, and particularly shews a swearing-in before twelve *burgesses*, the CHARTER-officers, (which should have been alleged to be before “the persons directed by the 11 G. 1. viz. the then *pre-siding officer*;)” and this, upon issue taken thereon, is found *against* him. Now surely this has not tried the MERITS: this issue was quite immaterial: and therefore there shall be a repleader; and this must be a repleader of our whole entire title.

But they say that “this is a DEFECTIVE title; not a mere *improper* title: and that therefore judgment shall be given against the defendant.”

Now this is not the rule of repleaders. Indeed if the bar be evidently NOT a good justification, it is idle to grant a repleader: but otherwise, a repleader shall be awarded. In Cro. Jac. 5. the case of *Coxe v. Cropwell*, the husband pleaded “Not Guilty,” when no tort was supposed in him: so that this was a case where

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where the real question had not been tried: and *therefore* the Court granted a repleader.

And the party who makes the first fault, may, notwithstanding that, pray a repleader.

Wherever the Court see, upon the whole record, that the issue joined *will not try the true question*, the Court will grant a repleader.

The case of *Serjeant v. Fairfax*, 1 Lev. 32. p. 13. c. 2. B. R. is strongly for us. It was a *bad plea*; it proceeded originally from the defendant; an immaterial issue was joined; and a verdict was * *against him*: and yet a repleader was awarded; BECAUSE *the merits* HAD NOT *been* determined, and the Court could not therefore know *for whom* to give judgment.

But they say that "HERE IS *sufficient* for the Court to give judgment upon."

I answer, that these are not to be taken as *independent unconnected* issues; but as ONE ENTIRE TITLE, though consisting indeed of various distinct *parts*. And he said HE could see no reason for the Crown's taking such a number of issues, upon these *quo warranto* informations: indeed perhaps the single issue of "NOT MAYOR," would take in the whole.

LORD MANSFIELD. — General rules, are wisely established, for attaining justice with ease, certainty, and dispatch.

But the great end of them being "*to do justice*," the Court are to see that it be *really* attained.

In order to discover what was just upon the present occasion, he said he would consider this case in two views; *viz.*

1st. Upon the mere foot of the *swearing*, as it is here pleaded and put in issue; and

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2dly.

V. ante.

* No: The verdict was for the defendant; and the plaintiff moved for a repleader. Indeed Twyden said, that it was the same thing. "be the verdict for the plaintiff, or for the defendant."

2dly. What alteration is made by the *other* issues, and the *verdicts* upon them, found in the manner as they have here been.

First—If *this* issue upon this swearing-in, had stood alone, this had been an *immaterial and void* issue; as it tends to *prove nothing*, either for the *Crown*, or for the *defendant*; and from which, *no conclusion* can be drawn, *either way*.

It appears too, upon the record, that this MIGHT *have been* so pleaded, as to have shewn whether he had, or had not a right; (supposing the question to be *confined* to this single issue.)

What is the rule of law then as to such an *immaterial* issue joined, and *verdict* upon it?

It is, “ that when the finding upon it does
“ NOT *determine the right*, the Court ought to
“ award a repleader: *unless* it appears from
“ the whole record, that *no manner of pleading*
“ the matter COULD *have availed*.”

The principal cases to prove this, are (amongst many others to the same effect) 6 Mod. 2. The case of *Staple v. Haydon*, [1st. resolution] where the Court held, “ That a
“ repleader is to be awarded, when *such* an issue is joined, as the Court, after trial thereof, cannot give a judgment, as being *im-pertinent*, and NOT *determining the right*: (I lay the stress on these words, “ AND NOT *determining the right*.”)

Moore 867. the case of *Tasler v. Salter*, [S. C. with *Hobart* 112] the verdict passed upon a void issue: and the Court awarded a repleader. It was as no issue at all, and *im-pertinent*, as pleaded,

Here,

Here, it MIGHT *have been* pleaded right : but *as* there pleaded, it did not conclude ; and therefore the Court could not determine the right.

So the case in *Cro. Eliz.* 245. *Love v. Wotton* (a plea of the statute of usury, upon the usurious bond) there, as the statute was pleaded, the conclusion, " that the obligation was " taken by usury, &c." was immaterial : but the statute *might* have been pleaded right ; and then it would have been a good defence : and *therefore* the Court awarded a repleader.

But there is a later case, (and the Courts have been more liberal of late years, in their determinations, and have more endeavoured to attend to the *real justice* of the case, than formerly ;) and this is the case of *Tryon v. Carter*, *M. 8. G. 2.* which is reported in 2 *Strange* 994. and is a very material case : " A bond conditioned for payment of money, " *on or before 5th December.* Plea of payment " *on 5th December.* Replication, issue, and " verdict for the plaintiff." This was holden to be an immaterial issue ; and a *repleader* was therefore awarded : though it would have been conclusive, if found for the defendant ; but did not conclude, when found for the plaintiff. Therefore (though that was a slip of the defendant) as it did not determine the question, a repleader was awarded.

The case that has been mentioned of *Rex v. Philips*, *M. 7. G. 1.* in *Strange* 394. is material, for the reason given by *Ld. Ch. J. Pratt*, for if the justification is such in point of matter and substance, as could not, if put into *any* form of words, be material with regard to the defendant by way of defence, it is in vain to

grant a repleader; it being to no purpose to do so, where the *case itself cannot be amended*, or would be at all material, if put in *any* shape whatsoever: which was that case; for it amounted to a confession of the usurpation, as was there holden. And if it did, then he very rightly said, “that *if* the Court should “grant a repleader, the defendant *could not* “mend his case; for the plea would stand; “and after the formality of a demurrer, the “Court must give judgment upon the good- “ness or badness of it.”

And Lord Chief Justice *Pratt* went on, and compared it to an ill justification in trespass, (where *no* form of words would have made it a defence;) and therefore was of opinion, that as the plea was ill, and contained no title to the franchise, the Court might give judgment upon it, as confessing an usurpation [Vide *1 Strange* 398.]

Now *here*, supposing (as I said before) the swearing to be the *only* issue; is it not a question totally *inconclusive*, “whether he was, or “was not, sworn before THESE persons?” “Does it at all *conclude* to the real QUESTION?” Is not this, manifestly, a slip? Does it not *appear* that this plea * *could have been mended*? Certainly it *could*; viz. by pleading the swearing-in to have been *agreeable to the statute of 11 G. 1. [c. 4. § 4. which directs it to be before the presiding officer.]* Therefore, the *REAL justice* of the case is, that this *slip* should *not* be fatal for ever.

This is a franchise of great importance. It is so, in *itself*: and, besides, the rights and privileges of *many other* persons do depend upon it. And these writs of *mandamus* issuing pursuant

* N. B. This plea seems to have been good in form; but insufficient as to fact.

See Fortescue's distinction in *1 Strange* 398.

purfuant to this act, were intended for the *settling* and *preserving* of corporations.

If this was the *single* iffue, I think they would be *clearly intitled* in this cafe, to a *repleader*. Yet

Secondly—It is objected, “ that here are “ *many other iffues, all found for the Crown, as “ well as this.*”

But the iffue juft now fpoken of, as immaterial, and void, is an iffue taken upon an effential part of an *entire* defence; for the defence here pleaded by the defendant is *one entire* defence: notwithstanding that the Crown is at liberty to take diftinct iffues upon the diftinct *parts* of it. And therefore it would be abfurd and inconfiftent, that the finding againft the defendant upon the *other* iffues, the other *parts* of *one entire* defence, fhould ftand; in cafe we fhould grant a repleader upon, or an amendment of *this* part: for if that fhould be permitted, the finding would ftill be *againft* the title of the defendant, it being fet up and pleaded as *one entire* title.

I agree, that if it appeared upon the whole record, “ that the defendant was not duly “ elected,” it would be as Lord Chief Juftice Pratt fays, a vain and idle thing, to grant a repleader.

But if the reft of the iffues are only *parts* of, and *dependent* upon the *WHOLE TITLE*; the fame reason does not then hold.

The way to do *complete* juftice indeed, is to let in the *one* fide, without prejudicing the *other*.

If a *repleader* was to be granted (upon the fuppoftion of this being the *only* iffue) it muft be * *WITHOUT* *cofts*. But as this was a miftake of the defendant; (in which the profecutor was

* V. 6 Mod.
2. 5th point,
accord.

not

not to blame) we ought to do the most complete justice we can, between both.

My Lord *Chief Baron* was right in his opinion, "that he could not admit proof *disferent* from the issue joined;" and also, "that this issue was *connected* with the "others."

If so, the verdicts were *without evidence*: and it was agreed, "that they were to be *without PREJUDICE*:" therefore, such verdicts ought to be set aside, *as without evidence*; and not to conclude against the defendant, which *would be a prejudice*.

Therefore he proposed to set aside the whole verdicts, on *payment of costs*; and to give the defendant leave to *amend* his plea.

If it had been upon a *demurrer* (which there might have been) the Court *would have given leave to AMEND*.

This seems to be the true way to come at justice; and what we therefore ought to do; for the true text is, "*boni judicis est, ampliare justitiam*;" (not "*jurisdictionem*," as it has been often cited.)

This is what I would *wish* to do, if we can do it.

Mr. Justice DENISON.—Formerly verdicts were not used to be set aside; and therefore, at that time, repleaders used very commonly to be granted. But they have been less usual of late, since the practice of setting aside verdicts has prevailed.

On repleaders, the issue was considered as void, and the verdict too; and consequently, the judgment was, "*to replead*."

An information in nature of a *quo warranto* does not differ from *other cases*.

Here

Here is an *entire plea*; the replication *separates* it, and takes issue on different *parts* of it. The replication *ought* to have *demurred* to this *immaterial* part of the plea: but *issue* is joined upon it: and there is a verdict upon it in the negative, *viz.* "that the defendant was *not* so sworn as he has pleaded." What can the Court do? The issue and verdict are *impertinent* and *void*. How then can the Court give *judgment*, when it *does not appear* whether the defendant had a right, or *NOT*? (I speak now upon this single issue *only*.)

Well then, if you set aside any *part* of the verdict, you must set aside the *whole*.

And this used, formerly, to be *one issue*.

I well remember that case of *Rex v. Philips*, *M. 7 G. 1.* it went upon an usage to hold over. The point was, whether a repleader should be granted, when the case could not be varied: and it was holden that that would have been vain and idle. On the contrary, it was said that it would be a different thing, if the case could have been *mended* upon a repleader. I do not doubt but that there were great numbers of *other* issues in that case, as well as in this; and yet a repleader *would have been there granted* if the case could have been *mended* on the usage.

The *whole* must be set aside, if *part* is set aside.

It is said, "that this is a *DEFECTIVE title*." But it is no *title at all*; it is *only one link* of the whole chain.

I think we may set aside the *whole* verdict upon *one* of the issues being void. And this is better than granting a *repleader*: upon which a writ of error may be brought, and may long depend;

depend; which will be a much greater delay of justice.

Mr. *Justice* FORSTER.—This was an election under a *mandamus*, upon the statute of 11 G. 1. in order to settle the peace of the burrough.

Here are twelve *issues* joined, *all* found for the king; and without evidence on any of them: so that none of them have been yet *really* tried.

It is agreed, “ that in case of a *single* issue “ which doth not determine the right (which “ way foever found) a repleader may be “ granted.”

The ninth issue in this case falls directly within this rule. It is totally immaterial to the question of right.

If therefore the verdicts on the other issues, *upon which no evidence was given*, vary the case and stand in the way of a repleader, they ought to be all set aside: or otherwise complete justice cannot be done.

And I think, as the case is circumstanced, the agreement mentioned by the Lord Chief Baron *, “ that the verdicts were to be without “ prejudice in any future trial,” may without a strain be extended to any *future litigation* in the cause.

Lord MANSFIELD. I am now fully satisfied, by what my brethren have said, that the *whole verdict* may be *set aside* on payment of *costs*, and with *liberty to amend the plea*.

But that must be on a particular motion. And I have no doubt but that we may do this, *WITHOUT the consent* of the prosecutors.

Which motions were accordingly afterwards made by Mr. *Norton*, and granted, after a faint attempt by Mr. Serjeant *Poole* to shew cause, and

* Vide ante.

and then to get costs as between client and attorney; in both which attempts he was unsuccessful: for the rules were both of them made absolute, upon payment of common costs; obliging the defendant, however, to take short notice of trial.

By an express agreement the obligee of a bond to secure an annuity, may waive the forfeiture for nonpayment on the day, so as to be intitled to recover against the obligor, although he has been discharged under an insolvent debtor's act, between the time of the forfeiture and the action brought.

This case, which came before the Court at different times, and in various shapes, was finally disposed of this day. As it was often cited in other cases during the period I have undertaken to report, I thought it might be proper to state the substance of the pleadings in the different proceedings, although I cannot give an account of the arguments of the counsel, and the Court, on the principal motion, from my own notes, having been absent when it came on.

The case was an action of debt on a bond—*Plea*, that the plaintiff ought not to have any execution *against the person, or personal estate, of the defendant, except money in the funds, or money lent upon real security only* *; because he says that the debt in the declaration mentioned was contracted or due before the 22d of January 1776, mentioned in a certain act of parliament, intituled, “An Act for the relief of Insolvent Debtors, &c.” (16 G. 3. cap. 8.) and that he was, before the 1st of January 1776,

Webster v.
Bannister, E.
20 G. 3. B. R.
Doug. 378.

* 16 G. 3.
cap. 38. § 41.

1776, arrested, and in actual custody; that he surrendered himself in discharge of his bail, and was thereupon committed a prisoner to the prison of the *King's Bench* before the 26th of *June* 1776, and was afterwards discharged, according to the form of the said act, at the quarter sessions for *Surry*, on the 29th of *July* 1776, and this he is ready to verify, wherefore he prays judgment if the plaintiff ought to have any execution against his person or personal estate, except money in the funds, or money lent upon real security only. The replication stated and made *profert* of the condition of the bond—which was for the payment of an annuity of £. 30. a year by the defendant and another obligor, to the plaintiff, in quarterly payments, on the 11th of *January*, of *April*, of *July*, and of *October*; the first payment to be made on the 11th of *January* 1772.—The replication then set forth, That after the 22d of *January* in the plea mentioned, and before the exhibiting the bill of the plaintiff, to wit, on the 11th of *July* 1776, £. 7. 10s. for one quarter, and so other quarterly payments, on the 11th of *October* 1776, the 11th of *January* 1777, and the 11th of *April* 1777, became due; and that the defendant hath not paid them, or any part thereof, on those respective days, or at any other time, but the whole remained due; “by reason of which premises the said writing obligatory in the declaration mentioned *became forfeited*, and the debt and action accrued *after* the 22d of *January* 1776, “in the plea mentioned,” and so concluded with a verification. After this replication, there was an *entry of judgment* on the record, for want of a plea in bar to the action,

tion, but with stay of execution against the person and personal estate, except, &c. until the plea depending between the parties in that behalf should be determined.—*Rejoinder*, That before the said 22d of *January* 1776, to wit, on the 11th of *January* 1776, £.7. 10s. for one quarter of the annuity became due, and was not paid then, nor at any time since, but still remained due, whereby the bond was *forfeited*, and the said debt, by virtue thereof, accrued to the plaintiff before the said 22d of *January* 1776.—*Surrejoinder*, That true it was, that £.7. 10s. for one quarter became due on the 11th of *January* 1776; but that the plaintiff afterwards, at the instance and request of the defendant, *agreed* to give him day of payment of the said £.7. 10s. until a future day, to wit, till *April* following, and that, on the 18th of *April*, the said £.7. 10s. was duly paid, and that at the time when the plaintiff so gave day of payment, he did, at the instance of the defendant, *waive* and relinquish any forfeiture of the bond, which had accrued, or might accrue to him by reason of the nonpayment according to the condition, and acquitted and discharged the defendant from such forfeiture, and all and every debt and debts due thereby; and the plaintiff further says, that the defendant, *by reason of the premises, was acquitted and discharged from such forfeiture and debts*.—*Rebutter*, By which (protesting that the *surrejoinder* was not sufficient in law, and protesting also that the defendant never requested the plaintiff to give such day of payment) the defendant says, that the £.7. 10s. in the *surrejoinder* mentioned, was not paid to the plaintiff in manner and form, &c.—Upon this *issue* was joined.

The

The cause was tried before Lord MANSFIELD, at the sittings for *Middlesex*, in *Easter Term* 18 *Geo.* 3. and a verdict being found for the plaintiff, a rule was obtained by the defendant for the plaintiff to shew cause why the judgment should not be arrested; which rule was afterwards enlarged to *M.* 19 *Geo.* 3. when the *Solicitor General* and *Bower* shewed cause; *Dunning* and *Baldwin* for the defendant.

The ground of the motion (as I have been well informed) was, that the bond being once forfeited, the debt became absolute, and could not be again made contingent by any waiver of the forfeiture, on the condition of payment at a future day; at least it continued absolute till the compliance with the condition, which was not till after the insolvency, therefore the fact of the compliance with the condition after the insolvency was immaterial, and the plaintiff should have demurred to the rebutter, instead of joining issue on an immaterial fact. That the Court therefore ought to award a *repleader*.

On the other side it was insisted, that an obligee might waive the forfeiture, and thereby prevent the debt from becoming absolute even at law, especially since the statute of 4 and 5 *Anne*, cap. 18. The issue therefore was not immaterial, because the debt was to be considered as contingent or not at the time of the insolvency, according as the condition was or was not afterwards complied with. Or if the issue was immaterial, that was no reason why the plaintiff might not have judgment, provided enough appeared to intitle him to it on any part of the record; for, in such case, all that followed would be rejected (a), and here the conditional waiver appeared in the sur-rejoinder

(a)
For this they
cited 8 Co.

rejoinder and was not denied, and the debt was to be looked upon as contingent till a breach of the condition, and therefore was so at the time of the insolvency.

120. Ib. 122.
9 Co. 110. Hob.
56. Salk. 173.

BULLER, *Justice*, asked if it was not a rule never to grant a *repleader* when the issue is found against the party tendering it. He said he thought it was, and that he could find no case of any exception to it.

The rule was discharged.

The defendant, when he was arrested in this action, had applied to ASTON, *Justice*, and afterwards to the Court, to be discharged on filing common bail, and obtained a rule to shew cause, but which was afterwards discharged.

In *Michaelmas*, 19 Geo. 3. a writ of error was brought, but bail in error not being justified, a *capias ad satisfaciendum* issued in the ensuing term, the effect of which was prevented by a commission of bankruptcy against the defendant. The validity of the commission being afterwards disputed by the plaintiff, and another creditor who opposed the allowance of the certificate, the Chancellor directed an issue, which was not proceeded upon, and the plaintiff having brought a *scire facias* against the original bail, the defendant surrendered himself, and on a former day in this term, obtained a rule to shew cause why he should not be discharged out of custody.

This day, the *Solicitor-General* and BOWER shewed cause;—*Dunning* and *Howorth* for the defendant.

The ground of the application now was, that although the defendant, by imprudently taking issue on an improper fact, had failed in his defence to the execution against his per-

son upon the pleadings, yet he was clearly intitled to be discharged under the insolvent act. They produced an affidavit denying that there had been an agreement to waive the forfeiture, and said that no such agreement had been proved at the trial, and, if issue had been taken on that fact, it must have been found for the defendant. The penalty therefore was a debt due at the time of the discharge under the act, and consequently he was no longer answerable for it, with his person.

On the other hand, it was insisted, that if there was any mistake in the pleadings, it was the defendant's own fault, and he had never moved for leave to amend. Besides, they said, (which was not contradicted on the other side) that it appeared at the trial, that a note had been given to the plaintiff for the payment both of the quarter due on the 11th of January 1776, and of that which was to become due on the next quarter day, and that the plaintiff, by taking this note, must be considered as having agreed to give further day of payment.

LORD MANSFIELD said, he thought the note would have been evidence of such an agreement, if issue had been joined on that fact, and that there was no doubt but the party might waive the forfeiture, and accept what he was equitably intitled to.

BULLER, *Justice*, absent.

The rule discharged.

Dougl. 381. 2.

Upon subsequent proceedings in *B.R.* in this cause, LORD MANSFIELD said, that there was no doubt but the party might *wave* the forfeiture, and accept what he was equitably intitled to.

A motion

A motion may be made in arrest of judgment, after a rule for a new trial has been discharged, and at any time before judgment is entered up.

Trespass for breaking and entering the close of the plaintiff, at the parish of *Otley*, in *Yorkshire*. The defendant pleaded; 1. The general issue; 2. A right of way, by prescription, through a lane of the plaintiff's contiguous to the *locus in quo*, to *Otley Bridge* on the river *Wharfe*; that the tenants and occupiers of THE LOCUS IN QUO were, from time whereof, &c. by reason of their tenure, bound to repair the lane, and the banks thereof next the river; that, at the several times when, &c. the lane was out of repair, and overflowed with water, so that the defendant could not use the way without imminent danger of the loss of his life and goods; and that he necessarily went into, through, and over, the *locus in quo*, as near to his said way as he possibly could, as it was lawful for him to do for the cause aforesaid; 3. That the *locus*, &c. lay contiguous to a lane of the plaintiff's, and that the said lane was adjoining to the river *Wharfe*; that the defendant had a right of way by prescription, through and over the lane; and, that because the lane and way were overflowed with water from the said river so much that the defendant could not at the several times, &c. pass or repass, he did necessarily go out of the said way, as near to the said way as he possibly could, into, through, and over, &c.

The plaintiff having traversed the prescription to repair laid in the first special plea, and the right of way laid in the last, the cause

Taylor v. Whitehead, Trin. 21 G. 3. B. R. Doug. 716. Thursday 28th June.

It is not a good justification in trespass, that the defendant hath a right of way over part of the plaintiff's land, and that he had gone upon the adjoining land, because the way was impassable from being overflowed by a river.

came on to be tried before Lord LOUGHBOURGH, at the summer assizes for *Yorkshire*, 1780; and the jury found for the plaintiff on the general issue and the first special plea, and for the defendant on the last.

(a)
Thursday 9th
Nov. 1780.

In *Michaelmas term* (a), a rule was obtained to shew cause why there should not be a new trial on the issue found for the defendant, as having been found against evidence, which rule was, upon argument discharged (b).

(b)
Friday 24th
Nov. 1780.

Afterwards, *Fearnly* obtained a rule to shew cause why the plaintiff should not be at liberty to enter up judgment on *that* issue, as well as the others, notwithstanding the finding of the jury, on the ground, that in point of law, although the defendant had the right of way through the plaintiff's close, he was not intitled to go upon the adjoining land of the plaintiff, when the way was out of repair.

On *Saturday*, the 3d of *February*, cause was to have been shewn against this rule, and *Lee* objected, that it had been applied for too late, for that it was in the nature of a motion in arrest of judgment; and, he said he had always understood the practice to be, that such a motion could not be made after a new trial had been moved for, unless the court, upon granting the rule for a new trial, should have given leave, if that should be discharged, to follow it by a motion in arrest of judgment. It seemed, he said, very unreasonable, that a party should be permitted to avail himself in so late a stage of the cause, of an objection that might have been taken in the first instance, by a demurrer to the plea, by which mode of proceeding, if the objection was founded in law, all the expence and vexation of a trial, and the motion

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to set aside the verdict, would have been avoided. In answer to this, it was observed by *Dunning*, that it would be extremely absurd if an objection should be stated to the court, and they should be convinced that the party had not, by law, a right to judgment in his favour, that they should yet be necessitated, by any rule of practice, to pronounce an erroneous judgment in his favour, and so force the other party to bring a writ of error.

After some consideration, and conference with the master, the Court declared their opinion, that a motion in arrest of judgment might be made at any time before judgment was entered up, and that the present motion, being of the same nature, was not too late.

It now appeared, that the officer, by mistake, had entered a verdict for the defendant on all the issues; upon which it became necessary for the plaintiff's counsel, to move for a rule to shew cause why the *postea* should not be amended from the Judge's notes, agreeably to the finding of the jury, and that the rule then before the Court should, in the mean time, be enlarged.

The *postea* was afterwards amended, and, this day, the question on the validity of the last plea was argued.

Lee, Davenport, and Wood, for the defendant. They argued as follows: It is clear law, established by a number of cases, particularly that of *Abfor v. French* in *Showers* (a), and *Henn's case* (b), that, where a common highway is out of repair, by the overflowing of a river, or any other cause, passengers have a right to go upon the adjacent ground. So, if the water impairs the banks of a navigable river, (which indeed is considered as a high-

(a)
B. R. M. 30
Car. 2. 2 Show.
28. S. C. Lev.
234.
(b)
8 Car. 1. Sir
W. Jones, 276

(c)
Young v. —
N. P. before
Lord Holt, 1
Lord Raym.
725.

(a)
B. R. M. 28 &
29. El. God. 4.
52.

(1)
(By counsel.)

(b)
B. R. E. 2 Car.
1. Poph. 161.
—But that part
of the reports
is not by Pop-
ham.

way) it is justifiable to go upon the nearest part of the field next adjoining (c). No cases are to be found upon the question as to private ways; but there are determinations, the principle of which is, that, where it becomes impossible for a person to exercise his right without a trespass on the soil of another, the law will *excuse* the trespass. Thus in *Dike* and *Dunstan's* case (a), it is stated (1) from the year-book of 6 *Ed.* 4. "That, if a man is to lop his tree, and *he cannot do it unless it fall upon the land of another*, then he may well justify the felling it upon the other's land, because, otherwise, he could not lop it all." So in the case of *Miller v. Faudrye*, reported in *Popham* (b), "a man may justify chasing sheep with a dog upon another man's ground, if he cannot otherwise drive them off his own." And in that case, there is one cited from 22 *Ed.* 4. 8. where it was held, "that, for necessity, a man who plows may turn his plow on the land of another."—(BULLER, *Justice*, "There a custom was laid")—And another from 8 *Ed.* 4. where it was laid down, "that if a tree grow in a hedge, and the fruit fall into another's land, the owner may go upon the land and fetch it." These are all trespasses occasioned, as in the present case, by the unavoidable interruption of the exercise of private rights in the regular way. It is of no consequence, upon this issue, who is bound to repair the road, because the justification is not that the road was out of repair, and ought to be repaired by the plaintiff, but that, by the overflowing of the river, it was *impossible* for the defendant to pass along the way, and therefore, he *necessarily* went out of it. If the question who ought to repair is said to be the material

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terial part of the case, and that the issue tried on the second special plea was immaterial, the motion ought to have been for a *repleader*, but as the plaintiff took the issue, the Court will not grant a *repleader* on his application (c). Supposing it not to be true in all cases, that a person having a private way over the land of another, may, when the way is impassable, justify going on the adjoining ground; yet, surely, he may, where the land over which the way is, and the adjoining land, both belong to the same person. He, or those under whom he claims, having granted a right of way over his estate, if the usual tract becomes impassable, the right continues, and must be exercised on the neighbouring ground belonging to the grantor.

LORD MANSFIELD mentioned that *Blackstone*, in his Commentaries, expresses an opinion that the law of *England* corresponds with the *Roman* law, on this point, extending the right of going on the adjoining ground when a road is out of repair, to private as well as public ways (a), and that *Comyns* in his *Digest*, seems to have entertained the same opinion (b).

Walker, Serjeant, for the plaintiff, insisted, that, by the common law, the grantee of a private way is bound to repair, unless there is an express stipulation for the grantor to do it. This principle, he said, was clearly deducible from the ultimate determination in the case of *Pomfrett v. Ricroft* (c), where one having granted the use of a pump, for a term, to another, and the pump having fallen into disrepair, the grantee brought his action against the grantor, and, upon demurrer, the court of *King's Bench* held (three judges against *TWIS-*

(c)
Vide ante,
Webster v. Ba-
nister.

(a)
3 Bl. Com. p. 36.
(b)
Com. Dig. tit.
Chimin. D. 6.

(c)
B. R. M. 21
Car. 2. 1 Saund.
321.

DEN) that it well lay, for that the grantor was bound to repair, but, upon a writ of error to the *Exchequer Chamber*, their decision was unanimously reversed. Now, on this record, he said, it was expressly found, on the first special plea, that the plaintiff was not bound to repair; and by the second, no custom or duty for him to repair was alledged. The defendant, therefore, must be considered as bound to repair in this case, and, if the road had become impassable by his neglecting to guard against the overflowing of the river, by keeping up the banks, it was his own fault, and he could not, on that account, be intitled to trespass on the neighbouring ground.

The Court stopped *Fearnly*, who was to have argued on the same side.

LORD MANSFIELD.—The question is upon the grant of this way. Now it is not laid to be a grant of a way, generally, over the land; but of a precise specific way. The grantor says, you may go in this particular line, but I do not give you a right to go either on the right, or left.—I entirely agree with my brother *Walker*, that, by the common law, he who has the use of a thing ought to repair it. The grantor *may* bind himself; but here, he has not done it. He has not undertaken to provide against the overflowing of the river; and, for ought that appears, *that* may have happened by the neglect of the defendant. Highways are governed by a different principle; they are for the public service, and if the usual tract is impassable, it is for the general good that people should be intitled to pass in another line.

WILLES and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*.—If this had been a way of necessity, the question would have required consideration, but it is not so pleaded. It does not appear that the defendant had no other road. There can be no ground for a *repleader*; for the plea is substantially bad; there is no fact alledged in it which could serve any purpose to deny, or go to issue upon.

The rule made absolute.

One information only, may, by leave of the Court, be exhibited under the Irish statute 19 Geo. 2. c. 2. sect. 4. against different persons, and against the same persons, for usurping different franchises: and there is not any necessity to state such leave upon the record.

This was a writ of error from a judgment of the Court of King's Bench in Ireland, in quo warranto, against Alexander Symmers, James Brown, George Staunton, Franklin Kirby, Abraham Marshall, and Thomas Grubb; to shew by what authority they claimed to exercise the privileges and franchises of freemen, free-burgesses, and common-council-men of the town and borough of Galway.

Symmers & alⁱ
v Regem in
error, M. 17
Geo. 3. B. R.
Cowp. 489.

Error from
judgment of
B. R. in Ireland,
in quo war-
ranto, against
corporators of
Galway.

The information set forth, that the borough of Galway is a town and borough incorporated by the name of the Mayor, Sheriffs, Free-burgesses, and Commonalty of the town and county of the town of Galway, and that a common-council is a constituent part of the said corporation. That the mayor, sheriffs, recorder, town-clerk, and all other officers of the said town of Galway, are to be elected and chosen only by the mayor, sheriffs, and common-council of the said town. And that the six de-

fendants

defendants have used and exercised the franchises of freemen, free-burgessees, and common-council-men, without any lawful authority whatsoever.

Plea.

The defendants by way of plea set forth, that the town and borough of *Galway* is, and from time immemorial hath been an ancient town and borough; and that the mayor, sheriffs, free-burgessees, and commonalty thereof, at the time of granting of the letters patent hereinafter mentioned, was a body corporate in deed, fact, and name; and that from time immemorial there was and yet is a *commonalty* consisting of an indefinite number of freemen, and also an indefinite number of free-burgessees; and also a common-council, consisting of an indefinite number of members duly elected, admitted, and sworn into the places or offices of common-council. That the sheriffs for the time being have been members of the said common-council, and also of a tholsell or general assembly of the said town; and say, that the mayor, sheriffs, recorder, town-clerk, and all other officers of the said town of *Galway*, have been, and are for the future to be elected and chosen only by the mayor, sheriffs, and common-council present, on the days whereon such elections were usually made.

That from time immemorial the custom hath been, that the *mayor* or other the chief officer and *common-council* of the said town for the time being, or *the greatest number* of the *said common-council present*, did and might, being duly assembled from time to time, *elect* such other discreet persons, not disqualified by any law in being, *members* of the said *common-council*. That from time immemorial the *electing* of any person or persons to be *freemen*

or

or free-burgeſſes, ſhall be by the ſaid *tholſell* or *general aſſembly*. That by certain rules, orders, and directions made and eſtabliſhed by the lord-lieutenant and council of the realm of *Ireland*, on the 23d of *September* 1672, for the better regulating of the corporation of the town of *Galway*, and the electing of magiſtrates and officers there, in purſuance of the ſtat. 17 and 18 *Car. 2.* intituled, “ An act for the explaining of ſome doubts ariſing upon an act, intituled, An act for the better executing of his Maſteſty gracious declaration, for the ſettlement of his kingdom of *Ireland*, and ſatisfaction of the ſeveral intereſts of adventurers, ſoldiers, and other his ſubjects there, and for making ſome alterations of and additions unto the ſaid act; for the more ſpeedy and effectual ſettlement of the ſaid kingdom,” it is directed, “ that no perſon or perſons, that ſhall be elected either mayor, recorder, ſheriff, treaſurer, alderman, town-clerk, or one of the common-council, ſhall be capable of holding, &c. until he or they ſhall have taken the *oath* of *ſupremacy* therein mentioned, and the *oath* of *allegiance* beſides the oaths uſually taken upon the admiſſion, &c. and alſo an oath in the ſaid rules preſcribed, commonly called the little oath. That *no matter* or thing in anywiſe relating to the affairs of the ſaid town, ſhall be *propounded* or debated in the *tholſell*, or any general aſſembly of the ſaid town, until the ſame ſhall have *firſt paſſed* the *common-council* of the ſaid town.” And it is further ordered, That all foreigners, ſtrangers, and aliens, as well others as Proteſtants, who are or ſhall be merchants, traders, artiſans, artificers, ſeamen,

“ seamen, or otherwise skilled in any mystery,
 “ craft or trade, who were then *residing* and
 “ inhabiting within the said town of *Galway*,
 “ or who should at any time hereafter come
 “ into the said town of *Galway*, with intent
 “ and resolution to *inhabit* and *reside*, upon
 “ payment down or tender of 20*s.* by way of
 “ fine, unto the chief magistrate or magistrates,
 “ and common-council, or other persons au-
 “ thorized to admit and make freemen, be
 “ admitted freemen *during his* or their *resi-*
 “ *dence* for the most part, and no *longer*.”
 That King *Charles* the 2d. by his letters pa-
 tent the 14th of *August*, in the 29th year of
 his reign, did grant, “ That the said town of
 “ *Galway*, and all castles lying within the
 “ space of two miles from every part of the
 “ said town of *Galway*, be one entire county
 “ of itself: and that there should be for ever
 “ thereafter, one new body corporate and po-
 “ litic in deed and name, consisting of one
 “ mayor, two sheriffs and free-burgesses, and
 “ commonalty, by the name of the mayor,
 “ sheriffs, free-burgesses, and commonalty of
 “ the said town and county of the town of
 “ *Galway* ;” and did thereby make certain
 persons particularly named in the said letters
 patent, to be free-burgesses: and grant, “ that
 “ the said persons so particularly named, and
 “ made free-burgesses, as also their successors,
 “ and likewise all and every such person and
 “ persons as should be of the common-council
 “ of the said town, *before* they be *admitted* into
 “ their respective offices, places, or employ-
 “ ments, *should take* as well the said herein-
 “ before mentioned *oaths of supremacy and al-*
 “ *legiance*, and the oath commonly called the
 “ *little oath*, and also the *oaths theretofore usu-*
 “ ally

ally taken, for the due execution of the said
 places and offices; the said several oaths to
 be administered by the mayor or recorder,
 and two of the free-burgesses of the said
 town; which letters patent the then mayor,
 sheriffs, burgesses, and commonalty accepted
 of. That by an act of parliament made in
 the 4th year of the reign of George 1st. inti-
 tuled, "An act for the better regulating the
 town of Galway, and for the strengthening
 the Protestant interest therein," it is enact-
 ed, "that no person shall be elected mayor or
 sheriffs, or common-council-men, who shall
 not be an inhabitant or inhabitants within
 the said town and liberties thereof, at the
 time of being elected into any of the said
 offices, respectively; and that hath or have
 not been resident for the space of one whole
 year before such election; and that all per-
 sons who profess themselves of any trade,
 mystery, or handicraft, that do or shall come
 to reside in the said town of Galway, in or-
 der to follow their respective trades, shall
 and are hereby declared to be free of the said
 town and corporation, and also of that com-
 pany or corporation to which their respec-
 tive trades belong, without paying any thing
 for such freedom; and shall continue free-
 men of such company or corporation, as
 long as they dwell in the said town, and no
 longer: PROVIDED, that no persons are to
 have the benefit of their freedoms as afore-
 said, unless they have been professed Pro-
 testants for seven years, or upwards, next be-
 fore their demanding their freedoms, pursuant
 to this act; and shall also take the usual
 oaths of freemen; and also the oaths of alle-
 giance, and supremacy, and abjuration; and
 make

“ make and subscribe the *declaration against*
 “ *transubstantiation, before the mayor of the*
 “ town, who is required to administer the
 “ same.”

The plea then set forth that *Symmers, Brown, and Staunton* were, on the 22d of November 1771, *duly elected* freemen and free-burgesses, their election and admission having first passed the common-council, and been propounded in the *Tholfell*.—The defendants, *Marshall and Grubb*, setting forth that they were *tradesmen, Protestants for seven years, and residents* within the town, further pleaded, that on the 4th of *February* 1772, an assembly or meeting of the mayor and common-council was in due manner holden at the *Tholfell*, and that they then and there *offered to take the oaths* of allegiance, supremacy, and abjuration, and *demand*ed from the mayor of the said corporation and the *common-council* there assembled, their freedom, pursuant to the said last-mentioned act of the 4th Geo. I. And there-upon the *electing and admitting* them the said *Abraham Marshall and Thomas Grubb*, to be freemen of the said town, &c. *passed the said common-council*. That afterwards, to wit, the 5th day of *February* 1772, a *tholfell* or general assembly was in due manner held at the *Tholfell*, and then and there the *electing and admitting* them the said *Abraham Marshall and Thomas Grubb* to be freemen was *propounded*, and they were *then and there in due manner elected* by the said *tholfell*, *freemen* of the said town and corporation. *All* the defendants further pleaded, that they were in due manner elected into the respective offices of free-burgesses and common-council-men, and that being so elected into the offices of freemen,

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free-burgesses, and common-council-men, they did before they were admitted, take the oaths of allegiance, supremacy, and abjuration, &c. and all the oaths usually taken, &c. before the mayor and two free-burgesses.—The replication took issue that the defendants were “not elected in manner and form aforesaid into the offices of freemen, free-burgesses, and common-council-men respectively.” And at the trial all the issues were found for the Crown. The defendants, in support of their title, gave in evidence the corporation books, in which were contained entries of their respective elections.

On the part of the prosecutor, a witness was produced, who gave in evidence, out of the corporation book so produced by the defendants, the orders of elections of nineteen persons there named; and further gave in evidence, that upon the elections of the defendants in the common-council, on the 21st of November and 4th of February, several of the nineteen, to wit, ten on the 21st of November, and twelve on the 4th of February, who were freemen, free-burgesses, and common-council-men, and who had done several corporate acts, tendered their votes against the elections of the defendants. That the mayor rejected their votes; and that if they had been permitted to vote, that is to say, the ten on the 21st of November, and the twelve on the 4th of February, there would have been a majority against the respective elections of the defendants.

The counsel for the defendants then gave evidence of the *disfranchisement* of all the nineteen persons, before the time of the elections of the defendants, by producing the orders of disfranchisement in the same corporation book.

That

That thereupon the relator's counsel gave in evidence several orders out of the same book; by which it appeared that *fifteen* of the said nineteen persons had been *restored* in pursuance of peremptory writs of *mandamus*; which fifteen included the ten who had done corporate acts, and whose votes were refused on the 21st of *November*, and the twelve who had also done corporate acts, and whose votes were refused the 4th of *February*; but by the dates of the orders, the restoration of the fifteen appeared to have been *subsequent* to the *election* of the defendants.

Whereupon, and after the said entries and also another entry had been read, the counsel for the defendants did object thereto. For that the said *entries* of restoration in the said book were not admissible evidence, without first producing the *mandamus's*, and returns, or *attested copies* thereof. But the justices over-ruled the objection, and did permit the said matter to go to the jury as evidence of the restoration of the said persons without producing the writs, returns, or attested copies.

And thereupon the defendants counsel, to prove the said issue, and that the defendants were duly elected, did produce, give in evidence, and read the stat. 4 *Geo.* 1. by the defendants particularly pleaded; and offered to give in evidence, that the said several persons (the fifteen who had tendered their votes and done corporate acts) were not inhabitants, &c. and resident for one whole year before their respective elections; and did insist that such evidence ought to go to the jury, which the justices refused to admit. Upon which, the defendants counsel tendered a bill of exceptions to *Godfrey Lill*, Esq. the judge of assize, which he sealed.

The

The bill of exceptions having been returned into the Court of *King's Bench* in *Ireland* as part of the record; the Judges, after hearing arguments upon it, gave judgment of *ouster* against all the defendants; whereupon this writ of error was brought.

Mr. BULLER, for the plaintiffs in error, argued, that this information was bad; 1st. Because filed against *six* different persons, for usurping *three* different offices. That such an information would clearly have been bad at common law. In 2 *Strange*, 921. *six* were indicted for perjury, and judgment was arrested solely on that ground. In 1 *Str.* 623. an indictment against *six* for exercising a trade, was quashed. In *Rex* versus *Tucker et al'*. *Pasch.* 7 *Geo.* 3. *B. R.* 4 *Burr.* 2046. an indictment against *eleven* was quashed for the same cause. 2 *Barnard.* 24. So in *quo warranto*, several cannot be joined. *Rex* versus *Jarvis* and *Clarkson*, *Tr.* 10 *Geo.* 2. *M. S.* If not good at common law, the next question is, whether it is aided by the *Irish* statute 19 *Geo.* 2. c. 12. which directs, "that it shall be lawful for the
 " proper officer of the court, to exhibit one or
 " more informations against any person or
 " persons usurping offices, and to proceed
 " thereon in such manner as is usual in *quo*
 " *warranto*; and if it appears that divers
 " rights may be determined on one informa-
 " tion, one shall be sufficient to try them."
 This statute must be construed with some restriction; otherwise the words themselves would carry a meaning nobody could contend for; and authorise an information against the mayor of one corporation, the alderman of another, and the freemen of a third. The true construction must be, to confine it to cases

where the offices or franchises are in the *same corporation*, and *ejusdem generis*. But here, the offices are of a *different nature*. Again, the statute gives no authority to join *different claims*, but speaks merely of joining *different persons*. Therefore, if this information had been filed against *one* defendant only, and had charged him, as in this case, with usurping the *three* different offices of freeman, free-burgess, and common-council-man, it would have been equally bad. There is no precedent of such an information, and the practice is universally against it. But suppose this were a case within the statute, and that the Court could give leave to join different claims; it does not appear, that any such leave was given, or any discretion exercised by the Court on the occasion. Therefore, it must be taken to be an information at common law. Where several pleas are pleaded, it is the practice to state, that they are pleaded by leave of the court: and so it should have been done here.

2dly, As to the issues and the judgment on them, *two* of the defendants, *Marshall* and *Grubb*, have stated their right to the offices of freemen in virtue of their being *resident Protestant traders* within the stat. 4 Geo. 1. which enacts, that, in that case, they shall have a right to be admitted without *paying a fine*. The right they state therefore is a right under this act of parliament; and not by virtue of an election. The two issues joined on these pleas is, that they are *not elected*: at the same time, their true title is not denied; and yet judgment of *ouster* is given against them. Whereas the issue joined being an *immaterial issue*, and not founded on any fact in the plea, the judgment ought to have been for them.

3dly,

3dly, The judgment of the court below is founded on the bill of exceptions, of which they had no jurisdiction. *Davenport versus Tyrrel*, Trin. 9 Geo. 3. B. R.* So that the judgment is on issues not disputed; against titles admitted; and founded on what the court has no jurisdiction of.

* Since reported in
1 Black. Rep.
675.

Lastly, On the bill of exceptions itself, four different questions arise. 1st. Whether the persons whose votes were rejected at the elections of the defendants, were even voters *de facto*, at the time of the election. 2dly, Whether the evidence given by the prosecutor to prove them members *de facto*, was proper and admissible for that purpose. 3dly, Whether, if they were not freemen *de jure*, though they might be freemen *de facto*, it was not competent to the defendants, under the circumstances of this case, to prove at the trial that they were not so *de jure*. The 4th question is, if it were competent to them to do so, whether the evidence offered was proper and sufficient for that purpose.

As to the first question upon the face of the entry produced by the prosecutor to prove their admission, it appears that none of them were *actually* admitted, but only that there was an order they *should be admitted*: that is not an admission in any sense; and so it was held in *Rex versus Lisle, Andrews* 163. But it is infinitely stronger here, because the order was not made by the *general assembly*, but by the *common-council* only, who have no right to elect either freemen or free-burgesses. Another reason against their being members *de facto* is, that they had been *removed* before the election of the defendants, and such removal was then in force. The evidence given of their being

restored was subsequent to the time of the election. The *mandamus's* could have no effect 'till they were actually restored; and the very application for the *mandamus's* is evidence of their being out of possession. During the intermediate time, therefore, they could not be officers *de facto*. If disfranchised, it was no longer necessary to summon them to meetings of the corporation; though it should afterwards appear they were illegally disfranchised. It was so decided in 10 *Mod.* 76 *. But less would do here; for if the Court should be of opinion, that while disfranchised (unless rightful members) they could not vote; the judge did wrong in not receiving evidence to prove they were not *de jure* members.

* Hil. 10
Ann. Queen v.
Sutton.

The *second* question is, Whether the entries in the corporation books, of their being restored to the office of common-council-men, were proper and admissible, to prove them officers *de facto*. The entries of restoration were not voluntary acts of the corporation, but under the authority and compulsion of writs of *mandamus*. Therefore, the writs of *mandamus* themselves should have been produced, as being the best evidence: as in the case of inquisitions taken under a commission, the commission as well as the inquisition must be produced.

As to the *third* question, How far, and in what cases the right of the electors may be gone into on informations against the elected, as a *general* question, has never been decided. That a latent objection cannot be gone into, has been settled; but the reason in that case is not applicable to the present. Here, there was no surprise on the prosecutor. Rejecting evidence

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evidence of this sort does not tend to keep matters quiet; for if bad votes must be admitted, it is only introducing the elected into the corporation, for the sake of turning them out again. If the objection is notorious to the other party, it may be made; and here, the objection to the eleven voters in question was a matter notorious to both parties: therefore, their right might be gone into. Where the elector has been ousted by *quo warranto*, though the defendant was no party to the suit, and may be a stranger to it, yet the judgment is evidence against him; because of the public notoriety. Here, the objection to these eleven persons, was the point on which both parties agree the election must be decided. Both therefore were equally apprised. If the legality of these voters could not be entered into on this information, a presiding officer at an election can have no power of examining whether the votes are legal or not. But in all elections, particularly of members of parliament, the presiding officer exercises his judgment, whether a vote is good or bad. If the presiding officer has no right to judge, there can be no action for a false return. Besides, in this case, the evidence respecting the right, was begun by the prosecutor himself; by entries to shew they were qualified and rightful members. If so, the plaintiffs surely have an equal right to rebut that evidence, and to prove they were not qualified. If, in such cases, evidence of the right is not to be gone into; by delaying the trial of some informations, and pushing on the trial of others, bad members might be established and rightful ones ousted. For instance, suppose three classes of voters, elected in *August, September, and Oc-*

tober; the first not duly elected; the second not duly elected without the votes of the first; the last elected by a majority, excluding those in *August*. On an information against the last, they must be ousted because they cannot disqualify the first set. Then, on an information against the second set, they must be established, and the prosecution fail, for the same reasons; then on an information against the first set, and they ousted; the consequence would be, that the second set, though not duly elected, would be established, and the third set, though duly elected, would be ousted.

The *remaining* question is, Whether the evidence offered was proper to prove that the persons rejected were not common-councilmen *de jure*. This depends on the stat. 4 *Geo.* 1. which is still in force, and the law of the place: it enacts, "that no person shall be elected, who is not resident a twelvemonth before." If so, there can be no doubt of the propriety of the evidence offered; for it was to prove they were not resident a twelvemonth before.—Upon the whole, whether the issue, of "not elected" be considered as an issue of fact only, or of fact blended with law, the plaintiffs in error are equally intitled. For if an issue of fact only, then ten were not members *de facto*, having been removed; and the prosecutor's evidence ought not to have been received. If the issue is blended with law, and it was competent to the prosecutor to go into the right, it was equally competent to the defendants to disprove what was given in evidence by the prosecutor. If it be merely a question of fact, we had a majority at the poll. If of law, the evidence of the title of the electors must be received. Therefore,

fore, in either case, the Judge did wrong; and consequently the judgment should be reversed.

Mr. *Davenport contra*. As to the *first* objection that several persons are included in one information, the statute 19 *Geo.* 2. furnishes a clear answer, by giving the court a discretion to join as many persons as they please. And as to the objection that the leave of the court does not appear on the record: it never does appear; and there is no necessity it should. *Secondly*, as to *several* claims being joined, it is said, it would have been bad at common law: but the cases quoted of several persons joined in an indictment for perjury*, and for exercising a trade†, are not applicable. Six could hardly be guilty of the same perjury. But there is no case which says, one man shall not be called on, for usurping different offices, in one information. The case in 2 *Barnardiston* 25, says, "two persons cannot be joined in one indictment;" it does not say *several offences* cannot. But this act says, "By leave of the court *different usurpations* may be joined." There is a case of *Rex versus Clendon*, in 2 *Str.* 870. where it was said, "two could not be joined in an indictment for an assault:" but that has been often over-ruled. If there be no precedent, it must be resolved on principles of law: and what principles of law says, the Crown cannot call on a man to shew why he exercises several franchises? It is more beneficial for the defendant, that his different claims should be joined; and one expence only be incurred. In *Co. Entries* and *Rastal's*, there are several precedents of informations, for usurping different offices. *Co. Entries*, 527.

* 2 *Str.* 921.

† 1 *Str.* 62, 3.

4 *Burr.* 2046.

tit. *quo warranto*, for usurping fourteen different franchises. And in the Earl of *Shrewsbury's* case, *ibid.* sixteen franchises are joined; and these in *quo warranto*; which is a stricter mode of proceeding than the information in nature of *quo warranto*, now substituted in its place. These cases occurred in the time of Lord *Coke*, and *Hobart*, attorney-general. It might as well be said, that goods sold, and work and labour done, shall not be joined. Therefore, the act of parliament is an answer to the first objection; and the principles of law to the second. The next objection goes to the form of the issue, with respect to *Marshall* and *Grubb*; who claim under the statute 4 *Geo.* 1. as resident traders. Now the right given by the statute, is a claim to be *admitted*, provided they are resident Protestant traders; but instead of shewing a title by *admission* under the act, they waive that, and shew a title by *election*, precisely in the same manner as the other defendants have done. Therefore the replication taking issue on such election is right.

Thirdly, As to the objection that the Court have proceeded on the bill of exceptions, of which they had no jurisdiction. If they had not, it is a mere *nullity*; and if the judgment be good independent of it, the Court will consider it as given on the verdict alone.

As to the fourth objection on the bill of exceptions, that the ten were not even voters *de facto*; 1st, because not *actually* admitted, and 2dly, because removed; if they were not actually admitted, the defendants themselves never were; for the entry of their admission is precisely in the same manner. As to their being removed, that of itself is an admission they were

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were once burgesſes: but by whom is the removal? By the common-council *only*, who are but a *part* of the body; conſequently, had no right to remove them. With regard to the admiſſibility of the proſecutor's evidence to prove them voters *de faëto*; if the defendants had a right to produce the entry they did, to diſprove their right by ſhewing their amotion, it was clearly competent to the Crown to ſhew they were reſtored by an entry in the ſame book, without producing the writs of *mandamus* themſelves. Written evidence muſt be all taken together; therefore the evidence was clearly admiſſible, and if ſo, the act of reſtoration, by relation back, makes them in from 1761, and puts them in the ſame ſituation as if they had never been out of poſſeſſion.—As to the 3d point, it is dangerous to attack *derivative* titles, by an objection to the *original* title. If the *electors* were *de faëto* members, they ought not to have been rejected on the ground of a defect at the time of their own election; nor could the queſtion be gone into. There are but two ways of attacking the title of an elector *de faëto*; the firſt is by information, which is the propereſt mode; becauſe the party beſt knows his own title. The other is by an iſſue introduced on the record, upon the title of the perſon whoſe right is meant to be queſtioned. A third way was attempted in the famous caſe of *Strode verſus Palmer, Lillic's Ent.* 248. by notice on the record, that particular votes would be objected to. But neither of theſe ſteps have been taken in the preſent caſe. Even judgment of *ouſter* is not concluſive; for if by colluſion, it may be controverted. *Rex verſus Hebden, Andr.* 388—392. But where there is no judgment of *ouſter*,

ouster, no act of removal apparently tortious will do. In other cases, the court requires that notice should be given of the fact meant to be insisted on. *Tufts* versus *Nevison*, 2 *Ld. Raym.* 1354. As to the 4th objection, it was decided in *Comyns* 243. *Austin* versus *Osborn*, that a man may have a right to vote, though never admitted.

LORD MANSFIELD.—There are *three* objections made to this judgment, independent of the subject matter of the bill of exceptions. The *first* is, that this is an information against *different* persons; and against the *same* persons for *different usurpations*. As to its being against the *same* persons for *different usurpations*, I think what Mr. *Davenport* has said, and the cases he has cited are very strong to shew, that the information would have been good at common law: but if it would not have been good at common law, it is strongly within the statute 19 *Geo.* 2. c. 12. *sect.* 4. *a fortiori*, when the statute gives leave to exhibit one and the same information, if the court shall think fit, against *different* defendants for the *several* rights claimed, or set up by them respectively. As to the other part of this objection, that this is an information against *different* persons; the answer is, that the act of parliament gives a discretionary power to the court to grant one or more informations, according to the nature and circumstances of the case: and to suppose extravagant cases, or that the Court would be absurd enough to join two franchises in different corporations, is to suppose a case that cannot exist. The legislature trusts the court with the discretion of joining them; and upon an application for leave, the court goes into the nature of the question to be tried. In this case, nothing could be more proper, than to join

join the several defendants and the respective franchises they claim, which are three. The right of election is exactly the same, the question is the same, and the evidence the same. But then it is contended, that supposing this *substantially right*, it is *formally wrong*; because it is not stated to be filed against the several persons, and for the several offices they claim, by *leave of the court*. No such thing is necessary; no information ever states it to have been filed by leave of the court. The court gives the order, and the information is filed. But such leave never appears on the record. Counsel cannot sign an information without leave is first given: but it never appears on the pleadings; therefore, that objection is out of the case.

The next objection, independent of the bill of exceptions is, that *Marshall* and *Grubb* claim to be freemen under the *act* of parliament, and not by *election*, and therefore, the issue as to them is an *immaterial* issue, being joined on the *election*. The answer to that is, the defendants themselves have put it so; and call their admission by the corporation, an election. They are not freemen *ipso facto*, by the act of parliament; but they must shew they are so, by proving themselves Protestants, resident in the town of *Galway* for a year, antecedent to their being admitted, and that they have taken the oaths prescribed. Therefore the defendants themselves have led the prosecutor into the mistake, if any, by calling their admission an election. That objection, therefore, has no weight.

The next objection is, that the court below have given judgment, not only on the verdict, and what arises out of it, but have likewise

gone into arguments on the bill of exceptions; and the judge before whom it was tried, appeared personally, and brought his bill of exceptions before the court of *B. R.* in *Ireland*. It certainly is so: the court has proceeded by mistake on the bill of exceptions, and gone into arguments upon it. Till very lately, there was no bill of exceptions in *Ireland*, and they were at a loss in this case how to proceed. The statute giving the bill of exceptions, says, it shall be brought by the judge who tried the cause into the superior court. It is so here: a bill of exceptions from the *C. B.* comes into this Court immediately; it goes from hence originally, to the lords in parliament. Where there is a bill of exceptions from the *B. R.* in *Ireland*, the judge must bring it into this Court. To ease him from that trouble in this case, a commission issued to Lord *Annaly* to take the acknowledgment of his hand and seal. They were doubtful whether they should not certify the transcript, as they do of all their other records.

But if the court of *B. R.* in *Ireland* had no jurisdiction upon the bill of exceptions, What is the consequence? They have proceeded on good and bad grounds. Though this Court differs from them on the bad ground, it does not follow that they differ from them on the good. If there is a good ground, independent of the bill of exceptions, that is sufficient. This Court cannot reverse a right judgment, because the court in *Ireland* has proceeded erroneously in respect of something else which they ought not to have entered into.

Then we come to the merits of the subject matter of the bill of exceptions; and as to that, *four* questions have been made,

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The *first* question is, Whether the ten voters who offered their votes, and were rejected, ought to have been received. Upon this question the validity of the defendants election entirely depends.

The first objection that has been made against their right to be received, is, that they were not even voters *de facto*. This objection has been attempted to be supported on two grounds; 1st, because they were never admitted of the corporation, the order produced in evidence, being only that they *should* be admitted, and does not say they *were* admitted. But on the proceedings produced it appears, that for ten years they acted as burgesses; and *that* which was called an order of disfranchisement, considers them as burgesses. So the order for their restoration is evidence to be left to the jury, of their having been admitted; even supposing it rested on so nice a point, as whether it was made before, or after their admission.

The next ground is, that they had been *disfranchised*; that the disfranchisement was still in force, and their restoration not till *after* the election. As to this objection, a great deal depends upon the use of the word *disfranchisement*; otherwise it creates a confusion. But on looking into it, this is no disfranchisement, nor is there a pretence for calling it so: but it is doing that which the common-council had not the semblance of a right to do; taking upon themselves to judge of the validity of an election ten years before, and to declare it *null* and *void*, for want of a qualification at that time. The word "disfranchisement" signifies taking a franchise from a man for some reasonable cause; which they do not do, but only say they

never were common-council-men. What authority have the common-council to do that? None. It could be done only by information in the nature of a *quo warranto*. But suppose it had been a disfranchisement, how does it appear to the Court that the common-council have a right to disfranchise. It is incident to the corporation at large to disfranchise, but not to a select body. It does not follow that the select body who has a right to elect, has from thence a right to disfranchise. But the fact is, it is no disfranchisement at all.

The next objection is, that the *order of restoration*, as it appears by the corporation books, was not made till *after* the election, and that this order alone, is *not* the *best evidence*. As to that, the corporation books are clearly as good evidence to shew these persons were restored, as to shew they were disfranchised. It struck me at first, that the time of the restoration, and consequently the time of issuing the *mandamus*, which was not proved, might be material: that is, if the *mandamus* to restore the voters in question, was *before* the *election* of the defendants, and the order *actually* restoring them, was not till *after*; and to support their right, it had been necessary to make the order *relate back* to the *date* of the *mandamus*, the time of the writ issuing should have been shewn. But upon consideration, I think, that let the restoration come when it will, it *relates* to the *original right*. It would be so in the case of a probable ground of disfranchisement. But here, there is not a probable ground: there is no colour for a removal; the act of common-council was a mere nullity, and the restoration makes them in from the beginning.—Thus it stands as to their being voters *de facto*.

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The next question is, being voters *de facto*, whether, on the trial of the respective rights of the several defendants, the elected, the rights of the voters to their corporate franchise can be gone into, without any notice on the record, or collaterally. It is true, that, in general, the person elected must take upon himself to support the right and title of his electors: it is so in a variety of cases. In the election of aldermen of the city of *London*, coroners, members of parliament, &c. all these are bound to support the rights of their electors. But, for the sake of justice and convenience, a distinction has been made in cases where the right of election depends upon corporate franchises. There are qualifications to the exception, such as have been stated by Mr. *Buller*. The general question has never been fully settled, though it has been touched upon in many cases. But this is settled; that no corporator is bound, by surprise, to go into the original qualification of any corporator in possession, who voted for him at his election; especially without notice. What would be the condition of these people? There are ten of them who, for ten years, have been quietly in possession without any information, or the idea of an information being brought against them. How can the question be gone into, with regard to their qualification, at such a distance of time; more particularly as that qualification depends on their residence and inhabitancy for a year, previous to the time of their election?

ASTON, *Justice*. This has not the least appearance of a disfranchisement. Can a common-council-man declare the election of another common-council-man null and void? In general, a disfranchisement must be the act
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of the whole body: and if a special power be delegated to a part of the body, it ought to be shewn. But no such power appears in the common-council. Therefore I look upon their order, in this respect, as a mere nullity. As to the qualification of the electors, it is not necessary at present to decide whether their right could have been gone into; because, if the mayor was bound to receive these votes, the election is clearly bad. As to the stat. 4 *Geo.* 1. that statute gives a man only a *right* to the freedom of the town; and to complete his title, he must go before the mayor, take the oaths, and produce the other proofs required. The issue follows the words of the plea. Therefore I am at present satisfied, that the judgment entered, is the proper judgment to be entered up on the verdict; and the circumstance of the court below having proceeded upon the bill of exceptions, shall not vitiate it.

WILLES, *Justice*.—My only doubt is as to *Marshall* and *Grubb*; for their right to be admitted freemen, is different from the others: and if they have performed the requisites of the stat. 4 *Geo.* 1. they are intitled to be admitted, and are by the act declared to be free. Whether the ten are good voters or not, as at present advised, I think *Grubb* and *Marshall* are good burgeses under the statute.

ASHHURST, *Justice*.—I entirely concur, that if enough appears upon the whole of the record, to shew that the court of *B. R.* in *Ireland* have given a right judgment, we ought not to reverse it: and I think the bill of exceptions makes no difference. The issue is taken in
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the same words as the plea, and the plea calls it an election.

LORD MANSFIELD. We will think of it as to this point, and give you our opinion; and if any thing more is necessary, we will let you know it.

Cur' advisare vult.

The Court afterwards said, they wished this case to be argued again. Accordingly it was argued again in *Hilary* Term 1777, by Mr. *Dunning* for the plaintiffs in error, and by Mr. *Mansfield* for the Crown: but all the points were given up except two. 1st. Whether, at all events, the defendants *Grubb* and *Marshall* were not intitled to judgment, their title under the *Galway* act not being denied or put in issue. 2dly. Whether the Judge below did not do wrong in rejecting the evidence offered, to shew that the persons rejected by the returning-officer had not a right to vote.—After the argument, the Court delivered their opinion, as follows:

LORD MANSFIELD.—There are two questions, *first*, Whether, upon this record, judgment ought not to be given for the defendants *Grubb* and *Marshall*? And, *secondly*, Whether the Judge below ought not to have gone into the several qualifications of the several voters, who voted as common-council-men, and whose titles he refused to enter into?

As to the first question, enough appears upon the record to incline us to think, that *Grubb* and *Marshall* really had a right to be freemen, if they had pleaded in a proper way: and if judgment of *ouster* on this record were to bar them for ever of the benefit of that right, a reluctance would arise in the Court, from the general prejudice they have against any party

losing his right, by a mere defect in his form of pleading. If that were the case, another principle must be adhered to, which is, that in all questions concerning the rights of corporations, it is most desirable and necessary, that the law should be certain, not only in respect of the matter, but also in respect of the form and manner of all their proceedings.

But my mind, with regard to *Marshall* and *Grubb*, is considerably eased, by being of opinion, that the judgment of *ouster* on this record will not bar them, if they apply in a proper way: because they will then have a new title, not affected by the present judgment. It may happen, that persons might apply at one time under the act of parliament, when they had no title; and at the end of six months after they might have a very good one. If it should be so in respect of these two defendants, the question is still open.

This case, as it is now brought before the Court, is an information against the two defendants, to shew by what authority they claim the offices of freemen, free-burgessees, and common-council-men of the town and borough of *Galway*. As to the offices of *common-council-men* and *free-burgessees*, the qualification and mode of election depend intirely upon the *constitution of the borough*. As to the office of *freemen*, there are two modes of acquiring that right: the one, according to the constitution of the borough, by the election of the mayor, common-council, and freemen, in general assembly, agreeable to the rules of the borough and its charter: the other, by special act of parliament, which consists and is complicated of many facts. This latter gives a *right* only, not a *title*; because the qualifications of the claimants

claimants must be judged of. They are to be tradesmen of certain trades mentioned; inhabitants within the borough for a year preceding; Protestants professed for seven years; and then they are to apply for their freedom. The act therefore gives but a *qualification*. The mode of obtaining their freedom is by application to the mayor upon the facts before mentioned. The mayor, therefore, *ex officio*, is to judge whether they are qualified within the act, or not; if they are, he must admit them; if not, he should reject them; and if he swears any one in without a qualification, such person may be *ousted* by an information.

But these two modes of acquiring the freedom of this corporation are attended with different consequences. The freemen elected according to the constitution of the borough, remain in possession of their franchise *for life*: those admitted under the act of parliament, continue so only during their actual *residence* in the town. It is necessary therefore to know which are chosen the one way, and which the other.

To the present information in nature of *quo warranto*, the two defendants have pleaded the *qualification* under the *act* of parliament. They certainly have pleaded that they desired to be sworn under the act of parliament: but then they join the title of common-council-men and the office of freemen in the same right, and they apply exactly the same words to each. They aver, that they were first proposed by the common-council, pursuant to the new rules for regulating the town of *Galway* stated in the plea, which require that they should be first approved of by the common-council, and

propounded to be elected at the *Tholfell*. But that is not necessary under the act of parliament 4 G. 1. Then they state that they were *duly elected*, and that being *so elected* into the office of freemen, free burgeses, and common-council-men respectively, they took the oaths before the *mayor* and *two burgeses*; which is the form in cases of election by the *constitution* of the borough. Here, therefore, they plainly rest their title on *election*, and go to issue on that title.

Upon this record it does not appear that they took any step to be made freemen by the act of parliament; therefore they have not shewn a complete title under the act of parliament: but rest their claim upon another title, upon which they have gone to issue, and which has been found against them. It is impossible therefore to give judgment for them.

The next, which is an objection of less difficulty, is, that the Judge below has refused to go into the qualification and capacity of several freemen and common-council-men who offered their votes. Let us state the objection as it is put, and examine it. The proposition is, that the Judge, on this information, should have done exactly what he ought to have done, if the title of these persons, who were common-council-men *de facto*, had actually been in question before him upon *quo warranto*. They were *de facto* members of the corporation, admitted, sworn, and in the actual enjoyment of the office. The question is, whether the Judge *collaterally* at the trial ought to have gone into the validity of these men's titles? Could the mayor have gone into it at the election? I am very clear he could not. There are modes sufficient, open to the partiality of
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returning-officers, without adding more. Where the qualification is to be judged of by him, it cannot be avoided. In cases of elections in the city of *London*, certain qualifications are required at the poll : therefore it must be seen that in some degree the candidates have that qualification. So where an election is to be tried which may involve many other rights. But where the right of election is in freemen in their corporate description ; whether they were duly chosen or not, is not to be tried at the election of a third person ; but they must be properly *ousted*. What ? after a possession of twelve years, shall their right be called in question and tried on an information against other persons who are proposed to be freemen ? It is impossible to be done. Suppose the right depended upon their being sworn in before twelve burgeses : is the right of those twelve to be tried in an information against one ? But the objection would go further ; for there are corporations where there are thousands of freemen. Upon the trial of a right of a freeman's election made by them, is the Court to go into the qualifications of all the thousand to have been made freemen at the time they were elected ? Certainly not. For this purpose they are to be considered as having a right. It is stronger too in the present case, because these were restored upon a *mandamus*, though I do not go upon that. It is all one objection. It would be to lay down a rule, that a party upon every new election, shall be at liberty to go into the corporate rights of all the members *de facto* ; which is a proposition that was never before heard of. Therefore I think the Judge did right in refusing evidence to impeach their titles.

Suppose a corporate body consisting of twenty-four were to add ten to their number. That would be an absolute nullity; because they never were corporators *de facto*. But the present question is, whether in a *quo warranto* against particular members, you can go into the title of other corporators *de facto*? And I am clearly of opinion you cannot.

ASTON, *Justice*.—Upon the second question I am very clearly of the same opinion. The *Carmarthen* case is in point.

The more material question is the first question, whether upon this record, there is sufficient to distinguish the case of *Grubb* and *Marshall* from the others? It does appear, that perhaps *Grubb* and *Marshall* may have been very well intitled under the statute 4 *Geo.* 1. to have demanded their freedom. But I cannot conceive a case, where a man has a right under a charter or statute by claiming it of the proper person, that, if refused upon that claim, and that claim only appearing on the record, it would be a good and complete right without a real admission. Upon the whole of the record, I think that *Grubb* and *Marshall* have put their defence upon their election, and stand on the same title as the rest. They have pleaded the usage of the borough in relation to the election. They then state the new rules of *Ireland* relating to this town of *Galway*; that nothing shall be done by the *tholfell* 'till it has passed the common-council. Then they state the oath to be administered; their residence; their being Protestants; their offer to take the oaths; and the demand of their freedom pursuant to the act. But saying so, does not make it in pursuance of the act.

Then

Then they state that a *tholfell* was held, and that *Grubb* and *Marshall* were propounded to be admitted; and were in due manner *elected* in consequence. They plead therefore just as the rest do. They join with the rest at least in saying they were *elected*, and that they took the *oaths* agreeable to *the charter*. Upon this plea therefore this was not a demand of their freedom in consequence of the qualification under the act; but they have pleaded that they were elected as other persons, without the act. The issue pursues the plea, that they were not elected; and I am clearly satisfied that this was a proper and not an immaterial issue.

WILLES, *Justice*.—I am clearly of the same opinion on the first point, but not on the second: with respect to which the doubts I before entertained are not satisfied.—There is a confusion upon the record whether freemen and free-burgesses are not the same. But certainly the common-council-man was a different person, and is not included in the act of parliament. The first right is by election, according to the custom of the borough, and where a man is *elected*, he is in for life, unless he commits a forfeiture of his franchise. But the act of parliament declares the freedom shall continue only during residence. As it stands on the record, I cannot agree with my brother *Aston* that the plea of all the defendants is alike. For *Grubb* and *Marshall* have pleaded a title under the act of parliament. The others do not. The question therefore is, whether there is enough stated in the plea to shew they are intitled under the act of parliament, and have done enough to acquire their freedom. If there is enough to shew that, and the issue is

joined on the election, it is an immaterial issue.

Now they first state the qualifications; next the act of parliament: what is the other requisite for them to do? they are to demand their freedom pursuant to the act. Does the plea go to it? The words are, "that they offered to take the oaths pursuant to the act of parliament." This was previous to any claim they had by election. But then they confound the two rights, by saying they *elect*ed and *admitted* them: as if the one term applied to one right, and the other to the other. They add that they have taken the oaths before the *mayor* and *two* of the *burgesses*; but joining the *burgesses* was not a necessary circumstance upon taking the oaths on admission: if they took them before the mayor, they had a right under the act of parliament. I do not therefore think the judgment of *ouster* should pass against them.—There is a strong case in *Strange*, 625. *Rex* versus *Hearle*, which makes me also in doubt, whether the judgment of *ouster* on this record will not bar the defendants title under the act, even if they should apply in a proper way; unless they can shew a new *subsequent* acquired right.

ASHHURST, *Justice*.—I had a doubt about a repleader upon the first title: but the joining issue upon the election makes the title under the act of parliament unnecessary. For if they had meant to have relied on that, they would have demurred to the replication.

Further, upon these pleadings, the title they have set forth in the plea under the act of parliament, is not complete; because the qualifi-

cation of being a Protestant, &c. is not a complete, but an inchoate title ; which they had a right to have rendered complete, by taking the proper steps before the mayor. Have they taken those steps ? If they meant to be admitted under the act, they should have given notice of such their intention. But it does not appear that they applied to the mayor to be admitted under the act. The contrary rather appears : for the admission set out is, an admission by the *mayor and common-council* ; which was an admission *under the charter* ; and not under the act of parliament. Therefore, if there is not a complete title under the act of parliament, judgment of *ouster* must go against them.

Besides, the court will not grant a repleader, but where complete justice may be answered. If a repleader were to be granted, the parties must begin from the point of pleading where the immateriality begins : the defendants say, it is in the replication. I think the issue taken on the replication is not an immaterial issue. What would be the consequence of granting a repleader ? The relator might reply *de novo*. He might in that case demur ; it would be doing nothing more therefore than putting him to demur for the duplicity of the plea, and the ends of justice would not be answered. If judgment of *ouster* is given on this right, it will not make the other title of the defendants bad. Therefore I think the judgment ought to be against them.

On the second point I concur, that the disqualification of voters for non-residence ought not to have been gone into at the time of election. If upon such a general issue as *non fuit electus*,

electus, it could be done, it would be the cause of endless prolixity.

Judgment affirmed.

As the doctrine of repleader is not generally known, the following abstract of cases (collected together in *Com. Dig.* V. 5. & 6.) may prove useful, as containing a great deal of matter, thrown into a narrow compass.

Yel. 210. Dan.
Ab. 720.

In an action against husband and wife, both ought to join in plea, and therefore if the wife alone comes and pleads, there shall be a repleader.

2 Cro. 28

So, if the entry be that the husband and wife come and defend the force and injury, and the aforesaid *wife* saith that she is not guilty.

5 Com. Dig. 168.

Though the *first* be supposed by the wife only: as, in battery against husband and wife, for a battery by the wife.

R. 2 Cro. 288.
Yel. 210.

So, in *assumpsit* against husband and wife, upon a promise of the wife *dum sola*.

R. Yel. 210.

So, in an action for words spoken by the wife only.

R. 1 Brownl.
197.

So, in battery against husband and wife and others, if the wife and others plead *not guilty*, and the husband *son assault*, it will be bad.

R. 2 Cro. 239.

So, in battery against husband and wife, if the husband justifies in aid of his wife, and the wife only pleads *son assault*, it is bad.

Semb. Cro. Car.
594.

So, they ought to join in the averment, and *this they are ready to verify*.

R. Cro. El. 883.
R. Hob. 126.
R. 2 Cro. 5.

But, where the *tort* is supposed by the wife alone, though both join in pleading, yet the issue ought to be, that the wife is not guilty; and therefore in *trover* upon a conversion by the wife, if the husband and wife plead that *they* are not guilty, it is bad, and a repleader

shall be awarded, for it ought to be, that *she* is not guilty.

R. Cont' in an action for words by the wife, for both are chargeable with a wrong done by the wife. Cro. Car. 417.

R. Acc. in action for words by the wife.

Yet in debt against them, they may plead, that *they* do not owe. 1 Brownl. 6. Pal. 68. and Q. if this is not law? Noy, 41.

The issue that *they* are not guilty cannot be amended. This after verdict. 2 Cro. 530. R. Cont. 1. Brownl. 7.

But, if the dogget be that the husband and wife *plead* not guilty, and the roll be that the wife *saith*, omitting the husband, it shall be amended; for it is only the misprision of the clerk, for the dogget was a warrant to him to enter on the roll a plea for both. R. 2 Cro. 530.

If the verdict finds that the wife alone is guilty, it aids the plea. R. Pal. 68.

If an issue is misjoined, or joined on an immaterial point, &c. when it is not aided by the *stat.* 32 H. 8. a repleader shall be awarded. Cro. El. 883. R. 1 Lev. 32. (Vide ante.) 2 Mod. 137. 144.

So, if the issue joined is nugatory and void, whereon the court cannot give judgment. R. Mod. Ca. 2. Hard. 331.

So, if the issue is concluded to the country, where it should be to the record, &c. or *à contra*. R. 1 Leo. 90.

There shall be a repleader of a bar, replication, or rejoinder, which is bad; for at the first defect the repleader begins. Ray. 458.

By the common law, if an immaterial issue was joined, the court might award a repleader before trial. 2 Salk. 579.

But will not now, where the issue joined will be aided by the statutes of *jeofaile*. R. Mod. Ca. 3. Salk. 579.

So there shall not be a repleader where the trespass is confessed, though the issue was immaterial. 1 Salk. 173.

And

Cro. El. 883.

Hard. 331.

1 Leo. 79.

There may be a repleader after a verdict.

But generally there shall be no repleader upon a demurrer, without the consent of the parties. *Per* 2 *J. Rol.* 271. *Mo.* 461. *Agr. Mo.* 867. *Lat.* 147. *Adm.* 2 *Lev.* 142. *Cont. allowed* 3 *Lev.* 440. *per Powell Mod. Ca.* 102. *R. Sav.* 89. 2 *Bul.* 37.

Yet, if there be a bad bar, and a bad replication, a repleader may be awarded upon a demurrer. *Bro. Replead.* 39. *But Periam said, the roll of that case could not be found. R. Pl. Com.* 138. *a. But Periam said, that there it was by consent.* 1 *Leo.* 79. *Acc. per* 3. *J. Periam Cont.* 1 *Leo.* 79. *But in the same case it is doubted. Sav.* 89. *Semb. Cro. El.* 318. 1 *And.* 167.

R. Mod. C. 3.

So there shall be no repleader, where by the defect in joining issue, there is a discontinuance.

R. 1 Salk. 216.

2 Salk. 579.

Or the defendant make default at the trial, whereby he is out of court.

R. 1. Rol. 287.

If issue be joined in Chancery, and the record sent into *B. R.* to be tried, for a defect in the *venire facias* a repleader shall be awarded in *B. R.* and not in Chancery; for the record being in *B. R.* can never be remanded.

Per Hale, 2

Saund. 319.

2 Lev. 12.

V. ante.

So anciently a repleader was awarded upon a writ of error, but this is now obsolete. *Cont. in Tindal and Brown, b.* 152.

R. Mod. Ca. 2

Salk. 579.

If a repleader be awarded or denied, when it should not be, it will be error.

Ibid.

If a repleader be awarded, the judgment is *quod replacitent*, and the fresh pleading begins where the first defect was.

Ibid.

There shall be no costs on a repleader. *Sed vide ante* 441, &c.

Hackshaw v.

Rawlings, H.

3 G. Stra. 23.

There shall be no repleader where defendant pleads payment, and acceptance in satisfaction of

of debt on bond, and plaintiff takes issue on the acceptance.

After inquest is taken by default, defendant cannot be received to make suggestion on the roll, for after default there can be no repleader.

Brampton v. Crabb, H. 3 G. 46.

Although an issue is immaterial, yet a repleader shall not be granted, if the cause can be ended more expeditiously; as if the plea be ill, or good in form, though not in fact, and amounts to confession.

Rex v. Phillips, M. 7 G. Stra. 394.

If plaintiff declares on a lease to *A.* which he lays is come by assignment to defendant, and he pleads that *A.* did not assign to him, and issue is joined, there shall be a repleader, for it is an immaterial issue.

Enys v. Mohun, M. 3. G. 2 Stra. 847.

In debt on bond, if defendant pleads payment before the day under a *scilicet*, there shall not be a repleader.

Cowne v. Barry, M. 7 G. 2. Stra. 954.

If a bond is conditioned for payment of money, *on or before 5th of December*, and defendant pleads payment on 5th of *December*, and plaintiff replies, and verdict for plaintiff, there shall be a repleader, for it is an immaterial issue.

Tryon v. Carter, M. 8 G. 2. Stra. 994.

Qu. de hoc? Suppose evidence of payment before the day, is not that payment on the day?

When the finding on an issue does not determine the right, the court ought to award a repleader, unless it appears from the record, that no manner of pleading the matter could avail.

Rex v. Phillips, p. 30 G. 2. 1 Burr. 292. which vide ante.

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